

(G-130)

Supreme Court, U. S.

FILED

OCT 29 1976

In The

MICHAEL RODAK, JR., CLERK

**Supreme Court of the United States**

October Term, 1976

No. **76-616**

THE STATE OF NEW YORK,

*Appellant,*

— against —

CATHEDRAL ACADEMY,

*Appellee.*

APPEAL FROM THE COURT OF APPEALS  
OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION ON BEHALF  
OF APPELLANT

LOUIS J. LEFKOWITZ  
Attorney General of the State  
of New York  
*Attorney for Appellant*  
The Capitol  
Albany, New York 12224  
Telephone: (518) 474-7138

Ruth Kessler Toch  
Solicitor General

Jean M. Coon  
Assistant Solicitor General  
*Of Counsel*

## TABLE OF CONTENTS

	Page
Statement as to Jurisdiction on Behalf of Appellant .....	1
Opinions Below .....	2
Jurisdiction .....	2
Statute Involved .....	4
Questions Presented .....	5
Statement of the Case .....	6
How the Federal Questions Are Presented .....	10
The Questions Are Substantial .....	10
Conclusion — Appellant respectfully prays that this Court note probable jurisdiction in this cause and place the case upon the calendar for argument .....	19

---

Appendix A — Court of Appeals Memorandum .....	A1
Appendix B — Opinion in Appellate Division .....	A2
Appendix C — Order of the Court of Appeals .....	A17
Appendix D — Notice of Appeal to the Supreme Court of the United States .....	A20
Appendix E — Chapter 996 of the 1972 Laws of New York .....	A22

### Table of Authorities

#### Cases:

<i>Abington School District v. Schempp</i> , 374 U.S. 203 ..	12, 13
<i>Board of Education v. Allen</i> , 392 U.S. 236 .....	10, 12
<i>Committee for Public Education and Religious Liberty v.</i> <i>Levitt</i> , 342 F. Supp. 439 .....	7, 14
<i>Committee for Public Education and Religious Liberty v.</i> <i>Levitt</i> , F. Supp. (1976) .....	6

	Page
<i>Engel v. Vitale</i> , 370 U.S. 421 .....	12
<i>Everson v. Board of Education</i> , 330 U.S. 1 .....	10, 11, 13
<i>Illinois ex rel. McCollum v. Board of Education of School District No. 71</i> , 333 U.S. 203 .....	12
<i>Lemon v. Kurtzman (Lemon I)</i> , 403 U.S. 602 .	4, 10, 15, 18
<i>Lemon v. Kurtzman (Lemon II)</i> , 411 U.S. 192	2, 3, 7, 8, 9,
.....	10, 15, 16, 18
<i>Levitt v. Committee for Public Education and Religious Liberty</i> , 413 U.S. 472 .....	2, 4, 7, 10, 13, 14
<i>McGowan v. Maryland</i> , 366 U.S. 420 .....	4, 12
<i>Meek v. Pittinger</i> , 421 U.S. 349 .....	10
<i>Sherbert v. Verner</i> , 374 U.S. 398 .....	4
<i>Tilton v. Richardson</i> , 403 U.S. 672 .....	10
<i>Torcaso v. Watkins</i> , 367 U.S. 488 .....	12
<i>Walz v. Tax Commission</i> , 397 U.S. 664 .....	14
<i>Zorach v. Clauson</i> , 343 U.S. 306 .....	4
<b>United States Constitution:</b>	
First Amendment .....	2, 5, 6, 7, 10, 13
<b>Statutes:</b>	
28 U.S.C. Sec. 1257(2) .....	4
New York Laws 1970:	
chapter 138 .....	6, 7, 8, 13, 16
New York Laws 1972:	
chapter 996 .....	2, 4, 7, 8, 10, 14, 15, 16, 18
New York Laws 1974:	
chapter 507 .....	13
chapter 508 .....	13
<b>Other Authorities:</b>	
Religion and the Law, 15 S.C.L. Rev., 855 .....	13

In The  
**Supreme Court of the United States**

October Term, 1976

\_\_\_\_\_  
No.  
\_\_\_\_\_

THE STATE OF NEW YORK,

*Appellant,*

— against —

CATHEDRAL ACADEMY,

*Appellee.*

\_\_\_\_\_  
APPEAL FROM THE COURT OF APPEALS  
OF THE STATE OF NEW YORK  
\_\_\_\_\_

STATEMENT AS TO JURISDICTION ON BEHALF  
OF APPELLANT

The appellant State of New York, pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, filed this Statement on the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on direct appeal to review the final judgment in question, and should exercise such jurisdiction in this case.

**Opinions Below**

The Court of Appeals of the State of New York did not render any opinion, rather the majority reversed on the basis of the dissenting opinion in the New York Appellate Division of the New York Supreme Court, Third Judicial Department, and

the dissenting judges relied upon the majority opinion in the Appellate Division. A copy of the Court of Appeals Memorandum is set out in the Appendix hereto and marked as Appendix "A". There is as yet no citation of the Memorandum decision. The majority and dissenting opinions of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, are reported at 47 A D 2d 390, 366 N.Y.S. 2d 900. A copy of those opinions is set out in the Appendix hereto as Appendix "B". The opinion of the Court of Claims of the State of New York is reported at 77 Misc 2d 977, 354 N.Y.S. 2d 370.

### Jurisdiction

This is an appeal from a final order of the Court of Appeals of the State of New York reversing an order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, which affirmed the judgment of the New York State Court of Claims dismissing the claim which had been filed pursuant to chapter 996 of the New York Laws of 1972, and which sought reimbursement for certain expenses for the 1971-72 school year which would have been paid by the State but for the declaration of unconstitutionality of the underlying statutory authorization for payment by this Court in *Levitt v. Committee for Public Education and Religious Liberty* (413 U.S. 472 [1973]). The claim here involved is one of more than 2,000 claims filed pursuant to chapter 996, which was selected for trial to test the validity of chapter 996. The dismissal of the claim by the Court of Claims and the affirmance by the Appellate Division of the State Supreme Court were based on holdings that payments pursuant to chapter 996 would be in violation of the First Amendment to the Constitution of the United States. The reversal by the New York Court of Appeals was based on the dissenting opinion of then Presiding Justice HERLIHY in the Appellate Division which would have held the statute and claim thereunder valid under the decision of this Court in *Lemon v. Kurtzman* (411

U.S. 192 [referred to hereafter as *Lemon II*]), and would have had the Court of Claims in each case adjudicate the question of whether or not the amounts claimed for reimbursement constitute a furtherance of the religious purposes of the claimant.

The order of the Court of Appeals appealed from was entered on July 13, 1976. A copy of the order is set out in the Appendix as Appendix "C". Notice of Appeal was filed with the Court of Claims of the State of New York on September 1, 1976. A copy of the Notice of Appeal is set out in the Appendix hereto as Appendix "D".

Although the order of the New York Court of Appeals reinstates the claim and remands it to the New York Court of Claims for trial, it is submitted that this Court has jurisdiction to hear this appeal as an appeal from a final order on two grounds. First, the decision of the Court of Appeals is final as to the question of the constitutionality of the underlying statute. That issue is not again triable in the Court of Claims on remand. Further, since the Court of Claims' jurisdiction on remand is to determine the amount of payment only, it is possible that there could be no further appeal in State courts because the issue of constitutionality will be *res judicata* in those courts, thus barring an appeal to this Court on the constitutional issue.

Secondly, we submit that the decision of the New York Court of Appeals, on the dissenting opinion in the Appellate Division, which suggested that, on the audit of the claim by the Court of Claims, the Court could try the issue in each case of whether or not the services or tests were sectarian in nature or utilized for sectarian purposes or whether the funds to be paid would be devoted to religious uses, itself creates a situation of excessive entanglement between government and religion and thus interjects a new element of unconstitutionality into this case.

Consequently, we submit that, despite the form of the Court of Appeals order, this Court has jurisdiction to review by direct appeal the order above cited pursuant to the terms of 28 United States Code, Sec. 1257(2).

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Sherbert v. Verner*, 374 U.S. 398 (1963); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Zorach v. Clauson*, 343 U.S. 306 (1952); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (hereinafter referred to as *Lemon I*); *Lemon v. Kurtzman* (II), *supra*; *Levitt v. Committee for Public Education and Religious Liberty*, *supra*.

#### Statute Involved

Chapter 996 of the New York Laws of 1972, provides as follows in pertinent part (the full text is set out as Appendix "E" hereto):

"Section 1. Jurisdiction is hereby conferred upon the court of claims to hear, audit and determine the claim or claims of nonprofit schools in the state, other than public schools, against the state for reimbursement of the funds expended by them in rendering services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports required by law or regulation. The base of said claim or claims is that the State of New York represented to said schools that they would be reimbursed for such expenses incurred after July first, nineteen hundred seventy; that the said State knew that said schools were relying on said representation; that said representation was an effective cause of said expenses by said schools; and that without any fault on the part of said schools complete reimbursement has not been paid to them, though due and owing. As such, said claim or claims are founded in right and justice, or in law or equity.

Sec. 2. In hearing, auditing and determining such claim or claims, the court of claims is hereby authorized to consider, *inter alia*:

(a) That prior to July first, nineteen hundred seventy, said nonprofit schools, rendered services for examination and inspection in connection with administering, grading and the compiling and reporting of the results of tests and examination, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualification and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation;

\* \* \*

(c) That . . . appropriations were made to the education department to enable the department to reimburse such schools for the rendering of such services;

\* \* \*

(e) That the federal courts, by various orders enjoined payments to such schools. As a result reimbursement for the full period July first, nineteen hundred seventy-one to June thirtieth, nineteen hundred seventy-two, has not been made to such schools, although all such services were or will be duly performed;

\* \* \*

Sec. 3. If the court finds that such claim or claims or any of them were founded in right and justice or in law and equity against the state of New York, and are in right and justice presently payable thereby, the state shall be deemed to have been liable therefor and such claim or claims shall constitute legal and valid claims against the state, and the court may award and render judgments for the claimants as shall be just and equitable . . . ."

#### Questions Presented

1. Where a statute authorizing payments to nonpublic schools for testing and record-keeping services was held to be unconstitutional by this Court as violating the First Amendment to the Constitution of the United States, does that declaration of invalidity bar the New York State Legislature from

authorizing the filing of claims in the New York State Court of Claims for reimbursement of the payments so held to be unconstitutional for the remainder of the school year in which the statute was declared unconstitutional?

2. Regardless of the prior decisions of this Court relative to the underlying statute, would the payment of the claim herein constitute a violation of the Establishment of Religion Clause of the First Amendment to the Constitution of the United States?

3. Regardless of the prior decision of this Court relative to the underlying statute, would the audit of this claim by the State Court of Claims, including an examination of the use of the funds and the services rendered in each case as envisaged by the Court of Appeals decision, to determine whether sectarian uses were involved, constitute a violation of the Establishment Clause?

#### Statement of the Case

In 1970, the New York State Legislature appropriated \$28,000,000 to compensate nonpublic schools for the expenses of record-keeping and testing required by State law or regulation (chapter 138 of the New York Laws of 1970). That statute, effective July 1, 1970, was the subject of an action, commenced June 30, 1970, in the United States District Court for the Southern District of New York, entitled *Committee for Public Education and Religious Liberty, et al. v. Levitt and Nyquist*. Cathedral Academy, appellee herein, and several other nonpublic schools were granted leave to intervene in the action as parties defendant. Although the action was commenced before the effective date of the act, no preliminary injunction was sought, at that time, to restrain payments pursuant to the statute. Consequently, appellee and other nonpublic schools received payments under the act for the entire 1970-71 school year and received the first of two payments scheduled for the 1971-72 school year. On

April 11, 1972, four days before the earliest date on which the second payment for that year could have been made, a three-judge United States District Court issued a preliminary injunction restraining the making of that payment, and, on April 27, 1972, handed down a final decision in which the majority held chapter 138 to be unconstitutional as in violation of the Establishment Clause of the First Amendment to the Constitution of the United States (342 F. Supp. 439). The defendants in that case, including appellee herein, appealed to the Supreme Court of the United States, which affirmed the District Court judgment (*Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472 [1973]).

Immediately following the District Court decision, the New York State Legislature passed a bill which became chapter 996 of the Laws of 1972, authorizing the New York State Court of Claims to hear and determine claims by nonpublic schools for reimbursement for the remaining sums which they would have received in 1972, but for the District Court decision.

Cathedral Academy is one of the over 2,000 schools which filed claims aggregating approximately \$11,000,000. The claim herein, for \$7,347.29, represents the sum appellee would have received in the latter part of the 1971-72 school year, pursuant to chapter 138, but for the holding of unconstitutionality. This claim was selected as a test case as to the validity of chapter 996. Appellee moved for summary judgment and the State cross-moved for the dismissal of the claim.

The State Court of Claims, by decision dated April 2, 1974, dismissed the claim, basing its determination on the holding of this Court in the *Levitt* case, *supra*, which held that the statute which preceded chapter 996, *viz.*, chapter 138 of the Laws of 1970, was unconstitutional. In so doing, the Court of Claims held that this implementation of chapter 996, in the form of an award to the claimant (appellee herein) would be constitutionally impermissible as violative of the Establishment Clause of the First Amendment to the Constitution of the

United States. The decision was specifically based upon the opinion of Chief Justice BURGER in *Levitt*, particularly the holdings that teacher-prepared tests were an integral part of the teaching process which posed a substantial risk of their use in the inculcation of religion and that the lump sum, per pupil allotment of funds, pursuant to chapter 138, prevented the reduction of the allotment by elimination of reimbursement for such tests.

Analyzing the provisions of chapter 138 of the Laws of 1970 and chapter 996 of the Laws of 1972, the State Court of Claims found that claims pursuant to chapter 996 are based upon payment for services rendered under chapter 138 and that an award to the claimant would result in the resurrection of chapter 138, which this Court had declared to be unconstitutional. The Court also considered and rejected the claimant's contention that payment under chapter 996 is authorized by the holding of this Court in *Lemon II*, *supra*. The Court distinguished the two cases on the basis that the underlying statute at issue in *Lemon* had been held unconstitutional because it resulted in excessive entanglement between government and religion, which entanglement had already occurred and would not result from the additional payment sought in *Lemon II*, while in *Cathedral* the payments were unconstitutional because they could be used for sectarian purposes and the assurance that they would not, present in *Lemon II*, was absent in *Cathedral*.

The Court of Claims in the instant action not only referred to the holding of this Court that the lump sum aid provided under chapter 138 was inseparable as between sectarian and secular uses, but also held that chapter 996 did not include any standards or guidelines by which the Court of Claims could make that separation. The Court concluded that those guidelines should be established by the Legislature, not the Court.

Judgment was entered in accordance with the decision on April 22, 1974. On May 13, 1974 claimant filed a notice of appeal.

On appeal, the Appellate Division of the New York Supreme Court, Third Judicial Department, affirmed the dismissal of the claim. Three justices, constituting the majority of that Court, rejected the applicability of this Court's decision in *Lemon II* to the facts of this case. That Court pointed out that this Court in *Lemon II* had found only a "remote possibility of constitutional harm" in the additional payment to the schools because the unconstitutional entanglement had already occurred and had already assured that the funds would not be used for sectarian purposes, whereas in the instant case such assurances could not be secured without excessive and unconstitutional entanglement in violation of the First Amendment.

The majority of the Appellate Division observed that the factor of greatest significance, leading to its decision, is that, in *Levitt*, the payments themselves were held to be unconstitutional because of the inability to identify secular purposes to which they would be applied.

The two members of that Court who dissented would have found a valid analogy with *Lemon II* and would further have found a moral obligation on the part of the State to make the one remaining payment for the 1971-72 school year. Significantly, the dissenting opinion of then Presiding Justice HERLIHY also observed that it was not the intention of the New York State Legislature that any funds be used for religious purposes and that the audit of the claims by the State Court of Claims would serve the same purpose as the post audit referred to in *Lemon II*, and that claimant must affirmatively prove that no funds will be used for religious purposes.

The order of the Appellate Division was entered on May 6, 1975 and on May 27, 1975, Cathedral Academy filed its Notice of Appeal to the New York State Court of Appeals.

The appeal was argued June 7, 1976. By decision, dated July 13, 1976, the Court of Appeals, by a vote of 4 to 3, reversed the order of the Appellate Division and reinstated the claim on the dissenting opinion of then Presiding Justice

HERLIHY at the Appellate Division. The three dissenting Judges voted to affirm on the majority opinion at the Appellate Division. Remittitur was entered July 13, 1976.

### How the Federal Questions Are Presented

The State's motion to dismiss the claim was based on the grounds that chapter 996 was unconstitutional under both the First Amendment to the Constitution of the United States and various provisions of the New York State Constitution. The decision of the State Court of Claims, holding the statute unconstitutional, was based solely on the Federal constitutional provision, as was the affirmance by the Appellate Division, and reversal by the State Court of Appeals.

### The Questions Are Substantial

Over a period of years, this Court has considered the question of what form of payments or aid may be provided to non-public schools or to children enrolled in them. The Court has held that school bus transportation may be provided to children attending sectarian schools (*Everson v. Board of Education*, 330 U.S. 1); that textbooks may be provided to children attending church-related schools (*Board of Education v. Allen*, 392 U.S. 236; *Meek v. Pittinger*, 421 U.S. 349); that public moneys may be spent for the construction of academic buildings at church-related colleges (*Tilton v. Richardson*, 403 U.S. 672); and has also held that payments may not be made either to schools or to individuals for the cost of teaching or teachers' salaries (*Lemon v. Kurtzman*, I and II, *supra*); nor to schools as reimbursement for the costs of record keeping and testing where teacher prepared tests are included in those for which reimbursement is provided (*Levitt v. Committee for Public Education and Religious Liberty*, *supra*).

The issue here is, fundamentally, whether, regardless of the guise under which the taxing power is invoked, the State may constitutionally use that power to furnish direct financial assistance to nonpublic schools which are controlled in whole or in part by religious denominations or in which denominational doctrines are taught. Every discussion on the impact of the First Amendment upon a state's taxing power begins with *Everson v. Board of Education*, *supra*, in which the issue was the provisions of a New Jersey statute permitting local school boards to provide transportation for students attending church schools. Mr. Justice BLACK, speaking for the majority of the Court, defined the scope of the Establishment Clause as follows (pp. 15-16):

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." (Emphasis added.)

The opinion further states (p. 16):

"New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church."

Fundamental to the concept of religious freedom, as envisaged by the framers of the First Amendment, was the belief that it was destructive of personal freedom to compel any man to pay taxes for religious purposes. Indeed, the history of the struggle for religious freedom in America is in large measure the history of the struggle against taxation for religious purposes.

The Establishment Clause of the Federal Bill of Rights was based upon the awareness of the historical fact that governmentally established religions and religious persecution go hand in hand and on the belief that a union of government and religion tends to destroy government and degrade religion (*Engel v. Vitale*, 370 U.S. 421 [1962]).

While four Justices in *Everson* disagreed over the application of these principles to the facts of the case before them, it is important to observe that all of the dissenters agreed as to the principles therein defined. What is more, this definition of principle has been repeated and reaffirmed repeatedly since that decision (See, e.g., *Illinois ex rel. McCollum v. Board of Education of School District No. 71*, 333 U.S. 203 [1948]; *McGowan v. Maryland*, *supra*; *Torcaso v. Watkins*, 367 U.S. 488 [1961]; *Board of Education v. Allen*, *supra*).

When he reached the application of the principle to the New Jersey statute, Mr. Justice BLACK concluded (p. 18):

"The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."

The application of the *Everson* doctrine to the instant case is clear and unquestionable. Here the State *would* contribute money to the sectarian schools; it *would* support them, even if only once, by the payment of funds which would have been paid in 1972 except for the Federal Court injunction. A tax *would* be raised for the support of such schools and thus, for the support of the religion they teach.

A further test as to the validity of statutory enactments relative to interaction between Church and State, was set forth by this Court in *Abington School District v. Schempp* (374 U.S. 203 [1963]), a case involving a State law requiring daily Bible reading in the schools, wherein the Court stated (p. 222):

"The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

While the *purpose* of the statute here in question might not be the advancement of religion, the *primary effect* of monetary aid to sectarian schools would be the advancement of religion and thus, such aid would be barred by the terms of the First Amendment.

Mr. Justice CLARK'S test, first set out in *Abington*, was amplified by the Justice himself in *Religion and the Law* (15 S.C.L. Rev. 855, 859 (1963) ):

"The phrase 'respecting the establishment of religion' prohibits situations where the church and state are one; where the church may control the state and vice versa; and where there is some working arrangement between the two \* \* \*. Finally, the term includes the furnishing of funds for facilities by the state where the purpose and primary effect is to advance religion."

Even if we consider the formula used in *Abington* independently of the language of *Everson*, the conclusion as to the statute here at issue must be the same as that reached on the basis of the criteria set forth in *Everson*.

Prior to the enactment of chapter 138 of the Laws of 1970, the nonpublic schools were required to provide record keeping and examination services to the State at their own expense, and since the determination in *Levitt*, they have been required to do so again.\* Funds paid pursuant to chapter 138, the

\* By chapters 507 and 508 of the Laws of 1974, nonpublic schools are being reimbursed for the actual expenses of required record keeping and administration of State prepared and mandated examinations. These statutes are the  
Footnote cont'd. next page

Courts held, compensated the schools for a portion of the costs of administering the teaching functions of the schools. This Court in *Levitt* held this compensation to violate the Establishment Clause of the First Amendment.

The opinion of the Supreme Court of the United States in *Walz v. Tax Commission of New York City* (397 U.S. 664 [1970]), while rendered in a case involving tax exemption of church-owned property and not on the issue of direct financial aid to sectarian institutions, sets forth additional considerations to be employed in testing whether particular legislation violates the First Amendment. The test, as phrased by Chief Justice BURGER, is two-pronged (669):

"Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so."

The Court's decision focuses on whether the statute fosters "excessive entanglement" between government and religious institutions. Such entanglement is variously characterized as "sponsorship", "interference", and a relationship generating "confrontation and conflicts". Most pertinent to this action, is discussing the alternatives of taxing or exempting church property, the Chief Justice observed (675):

"[T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for the enforcement of statutory or administrative standards \* \* \*."

Footnote cont'd.

subject of an action (*Committee for Public Education and Religious Liberty v. Levitt*) in which the United States District Court for the Southern District of New York has held the statutes unconstitutional and in which a Notice of Appeal to this Court has been filed.

That decision makes it clear that the test of a statute's effect is not whether the secular result is more important than the religious result, nor whether the activity aided is in form secular, but whether the degree of entanglement required by the statute is likely to promote the substantive results against which the First Amendment guards.

Applying that decision, this Court in *Lemon I, supra*, held invalid a Pennsylvania statute providing for payments to non-public schools of the costs of teaching certain secular subjects. The extensive auditing provisions, to insure that no State funds were used for religious purposes, the Court found to constitute excessive entanglement between Church and State.

Claimant in the instant case bases its allegations of validity of chapter 996 of the Laws of 1972 on the decision of this Court in *Lemon II, supra*. The Court of Claims, however, clearly set out the distinguishing features between this case and that in *Lemon II*, distinctions which result in unconstitutionality in this case. The Trial Court here held:

"Despite the holding in *Levitt*, claimant urges that *Lemon II* stands for the proposition that, even though a state statute may have been struck down under the Establishment Clause, nevertheless, when a claimant relies thereon, prior to the finding of unconstitutionality, in performing certain services with the expectation of reimbursement, which is not forthcoming, then, in right, justice, law and equity claimant should be reimbursed. As applied to the facts of the instant claim we disagree because in *Lemon II* the Supreme Court, after remand, found that any payments there allowed 'will not be applied for any sectarian purposes' (see pp. 202, 203), whereas in *Levitt* the Court found that 'the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities' (see p. 480).

\* \* \*

"The reimbursement in *Lemon II*, affirmed by the Supreme Court, was found allowable because of the very reason the statute was struck down, i.e., the excessive

entanglement by the State of Pennsylvania. Such process of oversight by the State, in the form of auditing, assured that State funds would not be applied for any sectarian purposes. Hence, the Supreme Court reasoned that, even assuming a cognizable constitutional interest in barring any state payments under the Pennsylvania statute, any payments to the schools would not and could not be applied by them in aid of sectarian purposes. That essential assurance is lacking in Chapters 138 and 996."

Rejecting the applicability of *Lemon II* to this case, the majority of the Appellate Division held:

"In striking down the Pennsylvania statute in *Lemon I*, the court focused upon the fact that the requirement of on-going scrutiny as above described fostered an 'excessive entanglement' between church schools and state. The validity of the payments themselves, on the facts there presented, was not determined—that issue did not arise until the question of reimbursement was raised in *Lemon II* (see 411 U.S. at 202). In allowing those payments to be made, the Supreme Court stated that reliance interests had significant weight in the shaping of an equitable remedy. However, those reliance interests were weighed not in a vacuum, but, rather, in the context of 'the remote possibility of constitutional harm \* \* \*' (*Lemon II*, *supra*, 411 U.S. at 203). That remoteness was founded upon the fact that entanglements in the nature of inspection, audit, and the like had already occurred, wherefore 'payment \* \* \* will compel no further State oversight of the instructional processes \* \* \*'. Moreover, and perhaps more significant to a consideration of the case at bar, 'that very process of oversight—now an accomplished fact—assures that state funds will not be applied for any sectarian purposes.' (*Lemon II*, *supra*, 411 U.S. at 202.) In reaching this conclusion, the court took notice of the existence of an 'insoluble paradox' inherent in the fact that payments to religious schools could not be made without some assurance that they would be applied only to secular purposes, yet such assurances could not be provided without engaging in the forms of oversight constituting entanglements of a sort prohibited by *Lemon I*. In *Lemon II*, the 'insoluble paradox' was 'avoided because the entangling supervision prerequisite to state aid has already been accomplished and need not enter into [an] evaluation' of the payments to be made (*Lemon II*, *supra*,

411 U.S. at 203, n.3). In the case at bar, on the other hand, the paradox is squarely presented.

"We are of the view that the paradox cannot be resolved without sanctioning a violation of the religion clauses of the First Amendment, and therefore we affirm. The factor of greatest significance in leading us to this result is that in *Levitt*, the payments themselves were held to be unconstitutional because of the inability to identify secular purposes to which they would be applied. Nor has any relationship been shown between the payment formula and such supposed secular purposes; as the court noted, '[e]xactly how the \$27 and \$45 figures were arrived at is somewhat unclear'. (*Levitt*, *supra*, 413 U.S. at 476, n. 4). For all its well-argued efforts to bring this case within the ambit of *Lemon II*, appellant has failed to demonstrate how payments under chapter 996 of the Laws of 1972 would differ in substance or form, in quality or quantity, from prohibited payments under the invalidated Mandated Services Act. [Footnote omitted] Thus, if payments are to be made under chapter 996 pursuant to the same formula as had been in effect under the Mandated Services Act, a finding that such payments would be unconstitutional because not limited to identifiable secular purposes is inescapable. If, on the other hand, chapter 996 contemplates that appellant and other schools are to be reimbursed only for actual costs incurred in performing the mandated services, some process of audit, inspection and supervision, invalid under the standards set up in *Lemon I*, would now be required.<sup>4/</sup> Because of this

---

<sup>4/</sup>Presiding Justice Herlihy, arguing in his dissent that reimbursement should be permitted because of the reliance by the schools upon the expectation of payment, is of the view that reimbursement should be in such amount as would be determined by the trial court to equal the expenditures incurred in performing the services. This amount, as previously suggested, may be markedly different from the amount which appellant and others might have expected under the Mandated Services Act formula. We are unable to agree with the contention that because appellant and others similarly situated relied upon being paid in an amount determined according to that formula, they should be entitled to reimbursement in an amount which bears no demonstrated relationship to the payments which would have been forthcoming under that formula."

fundamental distinction—the lack of an already-completed ‘entangling’ process—the constitutional interests at stake in the present case are weightier than those in *Lemon II*, and cannot be overcome by appellant’s reliance arguments.” (Emphasis added.)

Whereas in *Lemon* the unconstitutional factor was excessive entanglement and not unconstitutional direct aid to sectarian schools, in the instant case the unconstitutionality of the statute was based on the direct aid payments to the school. Chapter 996 would provide but one more such unconstitutional payment.

The New York Court of Appeals, however, reversed the Appellate Division decision and adopted the dissenting opinion of Presiding Justice HERLIHY in that Court. That opinion analogized the instant situation to that of the Pennsylvania schools in *Lemon II* and would have found the enabling act constitutional on the same basis. Further, that opinion, adopted by the majority in the Court of Appeals, would provide for an audit of each claim by the Court of Claims to determine the actual cost of the secular services rendered by the schools and that no money provided under the statute would be used for sectarian purposes. That audit would bring the instant case squarely within the auditing provisions found to be unconstitutional in *Lemon I*. The decision from which the appeal is taken would effect two violations of the First Amendment, first, by providing payment for services which have a primary effect of aiding religion and, second, by involving the government in excessive entanglement with religion in the auditing function.

The extensions of *Lemon II* to this or similar factual situations has not previously been considered by this Court. The question of the power of a State legislature to revive an unconstitutional statute, even for a single instance, is substantial as is the question raised by the Court of Appeals’ decision as to whether the audit of the claim by the Court of Claims would add a further element of unconstitutionality.

## CONCLUSION

APPELLANT RESPECTFULLY PRAYS THAT THIS COURT NOTE PROBABLE JURISDICTION IN THIS CAUSE AND PLACE THE CASE UPON THE CALENDAR FOR ARGUMENT.

Dated: October 20, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ  
Attorney General of the State  
of New York  
*Attorney for Appellant*

Ruth Kessler Toch  
Solicitor General

Jean M. Coon  
Assistant Solicitor General  
*Of Counsel*

# APPENDIX

A1

## APPENDIX A — Court of Appeals Memorandum.

### State of New York COURT OF APPEALS

#### Decisions

JULY 13, 1976

#### CASES

---

3	No. 342
Cathedral Academy,	<i>Appellant,</i>
<i>vs.</i>	
The State of New York,	<i>Respondent.</i>

---

Order reversed, with costs, and the claim reinstated on the dissenting opinion by then Presiding Justice J. Clarence Herlihy at the Appellate Division (47 A D 2d 390, 396).

All concur except Breitel, Ch.J., Jasen and Jones, JJ., who dissent and vote to affirm on the opinion by Mr. Justice Louis M. Greenblott at the Appellate Division.

## APPENDIX B — Opinions in Appellate Division.

#24780

SUPREME COURT  
STATE OF NEW YORK

APPELLATE DIVISION—THIRD DEPARTMENT

CATHEDRAL ACADEMY,

*Appellant,*

—against—

STATE OF NEW YORK,

*Respondent.*

(Claim No. 56557.)

Argued, February 18, 1975.

Before:

HON. J. CLARENCE HERLIHY,  
*Presiding Justice,*HON. LOUIS M. GREENBLOTT,  
HON. MICHAEL E. SWEENEY,  
HON. T. PAUL KANE,  
HON. JOHN L. LARKIN,  
*Associate Justices.*APPEAL from a judgment entered April 22, 1974, upon  
a decision of the Court of Claims (William L. Ford, J.).

## APPENDIX B — Opinions in Appellate Division.

DAVIS, POLK & WARDWELL (Richard E. Nolan of counsel),  
for appellant, 1 Chase Manhattan Plaza, New York, New  
York 10005.LOUIS J. LEFKOWITZ, Attorney General (Jean M. Coon  
and Ruth Kessler Toch of counsel), for respondent, The  
Capitol, Albany, New York 12224.

## OPINION FOR AFFIRMANCE

GREENBLOTT, J.

By chapter 138 of the Laws of 1970, the New York State Legislature enacted the Mandated Services Act which provided that for school years beginning after July 1, 1970 qualifying non-public elementary and secondary schools would be reimbursed for the expenses incurred in providing various testing, record-keeping and related services which were required to be performed by separate statutory provision. The payments were not contingent upon performance of the services since said services were independently required. Reimbursement was to be in the form of two equal installments, the first payable up to March 15, the balance payable between April 15 and June 15. No requirement that recipient schools account for actual costs incurred was imposed; rather, payments were to be determined pursuant to a statutory formula whereby each school was to receive for each pupil in average daily attendance \$27 in grades one through six and \$45 in grades seven through twelve. These amounts were determined because in the judgment of representatives of the State Education Department, they were "reasonable" (*Levitt v. Committee for Public Educ. & Religious Liberty*, 413 U.S. 472, 476, n. 4).

## APPENDIX B — Opinions in Appellate Division.

In July, 1970 an action was commenced in United States District Court for the Southern District of New York, seeking to have the Mandated Services Act declared unconstitutional as violative of the religion clauses of the First Amendment to the Federal Constitution. It was not until April 27, 1972 that a three-judge court by a divided vote declared the Act unconstitutional, and on June 1, 1972 a final judgment was entered permanently enjoining reimbursement to non-public schools (*Committee for Public Educ. & Religious Liberty v. Levitt*, 342 F. Supp. 439). In the interim, the 1970-71 school year and most of the 1971-72 school year had been completed, and since the complainants had not sought temporary injunctive relief, appellant, a non-public school operated under the auspices of the Roman Catholic Church, Albany Diocese, as well as numerous other non-public schools, was actually reimbursed for the 1970-71 school year and for the first half of the 1971-72 school year. An appeal was taken to the United States Supreme Court which on June 25, 1973, by a vote of eight-to-one, affirmed the judgment of the District Court (*Levitt v. Committee for Public Educ. & Religious Liberty*, 413 U.S. 472, [hereinafter, "*Levitt*"]). In so doing, the court referred to its decision in *Lemon v. Kurtzman* (403 U.S. 602 [*Lemon I*]), and in noting the "potential for conflict" inherent in state payments to religious schools, held that because the state had failed to take any steps to assure that "state-supported activity is not being used for religious indoctrination . . . Chapter 138 constitutes an impermissible aid to religion; this is so because the aid that will be devoted to secular

## APPENDIX B — Opinions in Appellate Division.

functions is not identifiable and separable from aid to sectarian activities" (*Levitt, supra*, 413 U.S. at 480).<sup>1</sup>

Subsequent to the District Court judgment, the New York State Legislature apparently took the view that non-public schools such as claimant had been placed in inequitable situations because they had already performed the services but could no longer be paid therefor under the invalidated Mandated Services Act. Accordingly, the Legislature enacted chapter 996 of the Laws of 1972 which, in essence, conferred jurisdiction on the Court of Claims to "hear, audit and determine" claims of eligible non-public schools for reimbursement of funds expended in the performance of services which had been required by law.<sup>2</sup> This appeal is from a decision of the Court of Claims dismissing the claim on the ground that chapter 996 violates the Establishment clause of the First Amendment. (It appears to be assumed by the parties that chapter 996 is intended to be limited in its application to reimbursing the schools solely for the second semester of the 1971-72 school year.) Appellant urges that equitable considerations, primarily

<sup>1</sup> This is not to say that the State could necessarily provide such assurance in a manner which would survive constitutional scrutiny. In *Lemon I*, the basis for invalidating Pennsylvania's and Rhode Island's aid programs was, briefly, the extensive process of audit, inspection and oversight required by the State to provide the necessary assurances, thus fostering an "excessive entanglement" between church and State. We shall refer to this problem later.

For a further explanation of the reasons underlying the court's determination that the payments were in danger of being applied for religious purposes, the opinion of the court, and of the Court of Claims in the present case, should be examined.

<sup>2</sup> No claim is made that appellant and other non-public schools should be required to refund payments which have already been made.

## APPENDIX B — Opinions in Appellate Division.

the good faith reliance by appellant and other schools in fashioning their budgets in expectation of payment warranted remedial legislative intervention, and that precedent for upholding the validity of one-time payments can be found in the decision in *Lemon v. Kurtzman* (411 U.S. 192 [*Lemon II*]).

In *Lemon I*, the case was remanded to the District Court to fashion a decree, whereupon the latter court enjoined payments under the Pennsylvania statute (Pa. Stat. Ann., tit. 24, §§ 5601-5609) but permitted the State to reimburse non-public sectarian schools for services provided before the Supreme Court decision. (There, as here, no temporary injunctive relief had been sought.) Under the Pennsylvania statute there in question, non-public schools were to be reimbursed for certain education services pursuant to contracts with the state. The services consisted of furnishing teachers, texts and instructional materials in certain "secular" courses. In addition to compensating the schools, the state was to "undertake continuing surveillance of the instructional programs to insure that the services purchased were not provided in connection with 'any subject matter expressing religious teaching' . . . ." (*Lemon II, supra*, 411 U.S. at 195). The statute further required the schools to maintain separate funds and accounts pertaining to the services provided, which accounts were to be subject to audit by State officials.

In striking down the Pennsylvania statute in *Lemon I*, the court focused upon the fact that the requirement of on-going scrutiny as above described fostered an "excessive entanglement" between church schools and state. The validity of the payments themselves, on the facts there pre-

## APPENDIX B — Opinions in Appellate Division.

sented, was not determined—that issue did not arise until the question of reimbursement was raised in *Lemon II* (see 411 U.S. at 202). In allowing those payments to be made, the Supreme Court stated that reliance interests had significant weight in the shaping of an equitable remedy. However, those reliance interests were weighed not in a vacuum, but, rather, in the context of "the remote possibility of constitutional harm . . ." (*Lemon II, supra*, 411 U.S. at 203). That remoteness was founded upon the fact that entanglements in the nature of inspection, audit, and the like had already occurred, wherefore "payment . . . will compel no further State oversight of the instructional processes . . .". Moreover, and perhaps more significant to a consideration of the case at bar, "that very process of oversight—now an accomplished fact—assures that state funds will not be applied for any sectarian purposes." (*Lemon II, supra*, 411 U.S. at 202.) In reaching this conclusion, the court took notice of the existence of an "insoluble paradox" inherent in the fact that payments to religious schools could not be made without some assurance that they would be applied only to secular purposes, yet such assurances could not be provided without engaging in the forms of oversight constituting entanglements of a sort prohibited by *Lemon I*. In *Lemon II*, the "insoluble paradox" was "avoided because the entangling supervision prerequisite to state aid has already been accomplished and need not enter into [an] evaluation" of the payments to be made (*Lemon II, supra*, 411 U.S. at 203, n. 3). In the case at bar, on the other hand, the paradox is squarely presented.

## APPENDIX B — Opinions in Appellate Division.

We are of the view that the paradox cannot be resolved without sanctioning a violation of the religion clauses of the First Amendment, and therefore we affirm. The factor of greatest significance in leading us to this result is that in *Levitt*, the payments themselves were held to be unconstitutional because of the inability to identify secular purposes to which they would be applied. Nor has any relationship been shown between the payment formula and such supposed secular purposes; as the court noted, "[e]xactly how the \$27 and \$45 figures were arrived at is somewhat unclear." (*Levitt, supra*, 413 U.S. at 476, n. 4.) For all its well-argued efforts to bring this case within the ambit of *Lemon II*, appellant has failed to demonstrate how payments under chapter 996 of the Laws of 1972 would differ in substance or form, in quality or quantity, from prohibited payments under the invalidated Mandated Services Act.<sup>3</sup> Thus, if payments are to be made under chapter 996 pursuant to the same formula as had been in effect under the Mandated Services Act, a finding that such payments would be unconstitutional because not limited to identifiable secular purposes is inescapable. If, on the other hand, chapter 996 contemplates that appellant and other schools are to be reimbursed only for actual costs incurred in performing the mandated services, some process of audit, inspection and supervision, invalid under the

<sup>3</sup> In addition to the distinction based on the fact that the decision in *Lemon I* did not invalidate the payments per se under the Pennsylvania statute, it is also noteworthy that the Federal Court there undertook to fashion an equitable remedy by carving out an exception to the scope of the injunction. Here, the Federal court has not seen fit to do so; the injunction against payments stands, without limitation.

## APPENDIX B — Opinions in Appellate Division.

standards set up in *Lemon I*, would now be required.<sup>4</sup> Because of this fundamental distinction—the lack of an already-completed “entangling” process—the constitutional interests at stake in the present case are weightier than those in *Lemon II*, and cannot be overcome by appellant’s reliance arguments.

Appellant argues, however, that those constitutional interests, just as the interests in *Lemon II*, will be “implicated only once under special circumstances that will not recur” (*Lemon II*, 411 U.S. at 202). In *Lemon II*, however, a constitutional interest arising from the payments was assumed for the purpose of discussion, since the constitutionality of the statute in *Lemon I* had not turned upon the invalidity of the payments per se, whereas in the present case, the constitutional interest is more tangible because of the invalidation of the payments under *Levitt*. Moreover, in this case, a further constitutional interest will be implicated because of the need for State oversight in the form, at the very least, of an audit process.

<sup>4</sup> Presiding Justice Herlihy, arguing in his dissent that reimbursement should be permitted because of the reliance by the schools upon the expectation of payment, is of the view that reimbursement should be in such amount as would be determined by the trial court to equal the expenditures incurred in performing the services. This amount, as previously suggested, may be markedly different from the amount which appellant and others might have expected under the Mandated Services Act formula. We are unable to agree with the contention that because appellant and others similarly situated relied upon being paid in an amount determined according to that formula, they should be entitled to reimbursement in an amount which bears no demonstrated relationship to the payments which would have been forthcoming under that formula.

## APPENDIX B — Opinions in Appellate Division.

We agree with the following remarks of the learned Judge in the Court of Claims:

Sympathize as we do with this claimant, and the many others similarly situated, and recognize as we must their great and ongoing contributions to the education of over 800,000 young people in this State, and aware as we are of the serious financial problems directly facing the parochial schools, and indirectly, the public, we are, nevertheless, at the same time, constrained because of the Supreme Court decisions in *Levitt* and *Lemon II*, to deny reimbursement as being unconstitutional. (*Cathedral Academy v. State of New York*, 77 Misc 2d 977, 985.)

The judgment should be affirmed, without costs.

HERLIHY, P. J. (dissenting):

The Court of Claims dismissed the claim of Cathedral Academy solely on the ground that chapter 996 was violative of the Establishment Clause of the First Amendment and was, therefore, void. It is from that decision that this appeal has been brought.

The appellant contends that the Court of Claims misapprehended both the purpose and effect of chapter 996 and that rather it provides a constitutionally valid means to reimburse qualifying nonpublic schools for the second semester of the 1971-1972 academic year.

The majority opinion amply set forth the background of this proceeding and I agree with its conclusion that the basis for the finding of unconstitutionality in regard to the Mandated Services Act in *Levitt v. Committee for*

## APPENDIX B — Opinions in Appellate Division.

*Public Educ. & Religious Liberty* (413 U.S. 472) (hereinafter referred to as *Levitt*) was different from the finding in the case of *Lemon v. Kurtzman* (403 U.S. 602 [*Lemon I*]). Nevertheless, the conclusion of the majority that the difference in the particular reason which required a declaration that the legislative enactment was unconstitutional would result in the one-time payment provided for in chapter 996 of the Laws of 1972 being different in nature or quality from that permitted in *Lemon v. Kurtzman* (411 U.S. 192 [*Lemon II*]) is not well founded.

Pursuant to chapter 996 of the Laws of 1972, there is to be a post audit to determine whether or not the mandated services had in fact been performed by the claimant.\* While it is true that in *Lemon II* there had presumably been active supervision of the affairs of the school so as to insure that the acts for which reimbursement was to be made were not at least directly for religious purposes, the post audit, which in this case is to be performed by the Court of Claims, will necessarily establish whether or not the amounts claimed for mandated services constitute a furtherance of the religious purposes of the claimant. To be sure, there will be an indirect furtherance of the religious purposes of the claimant Academy insofar as the costs of the mandated services required budgetary allowances away from the religious purposes of the claimant. However, that would be no more true in the present case than it was in the *Lemon* cases. The fact of an implicit

\* The statute conferred jurisdiction on the Court of Claims to "hear, audit and determine" claims of eligible nonpublic schools. In *Levitt* there apparently was a tacit understanding that \$27 per pupil would be paid for grades 1 through 6 and \$45 per pupil for grades 1 through 12.

## APPENDIX B — Opinions in Appellate Division.

furtherance by any State assistance or aid to sectarian schools whether on a one-time basis or on a continuing basis was recognized in the majority opinion in *Lemon II* (see 411 U.S. at 202). As in the case of *Lemon II*, the single proposed payment for services rendered during the period of the presumed constitutionality of the former Mandated Services Act reflects no more than the school's reliance upon the promise of payment for their continuance to exist as institutions of education and providing a level of education required by the State. Indeed, the majority recognize that in *Lemon II* "a constitutional interest arising from the payments was assumed for the purpose of discussion" and yet would undermine the constitutional sanctioning of a one-time payment where there had been reliance upon a presumably constitutional enactment. The failings of the Mandated Services Act and the enactments of Pennsylvania and Rhode Island, while distinguishable for purposes of understanding what will not be permitted in regard to State enactments which provide aid to religious institutions, have no immediately perceivable impact upon the consideration of whether or not a subsequent payment may be made for reliance where the statutes brought under constitutional attack are not upon their face patently an abridgement of the Constitution. The Legislature recognized a moral obligation to reimburse the schools for monies already budgeted and expended.

In *Lemon I* the court was confronted with substantially the same situation that existed in the *Levitt* action. The court in *Lemon I* observed at page 623:

Here [*Lemon*] we are confronted with successive and very likely permanent annual appropriations that bene-

## APPENDIX B — Opinions in Appellate Division.

fit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified.

The present action involving chapter 996 of the Laws of 1972 is more analogous with *Lemon II*, it being a "one shot" payment for services already performed.

In regard to *Lemon II*, the appellant states that as for the constitutional interests the court, after noting that the constitutional fulcrum of *Lemon I* was the excessive entanglement of church and state, observed that the one-time payment of \$24,000,000 to nonpublic schools will not substantially undermine the constitutional interests at stake in *Lemon I*. The court also noted two problems having constitutional overtones but held that they were minimal or outweighed by reliance considerations.

The court held that the equities of the reliance by the nonpublic schools on the expectation of reimbursement outweighed the constitutional "interests".

In the present case the Court of Claims found that permitting the implementation of chapter 996 of the Laws of 1972 "would have the effect of resurrecting chapter 138 [of the Laws of 1970] which the Supreme Court declared unconstitutional." It reasonably appears that the actual effect of chapter 996 of the Laws of 1972 is to close out the former Mandated Services Act and recognize its unconstitutionality instead of attempting to resurrect the same. In any event, Mandated Services (chapter 138 of the Laws of 1970) and chapter 996 of the Laws of 1972 are readily distinguishable.

## APPENDIX B — Opinions in Appellate Division.

At this posture of the litigation we should be guided by the action of the court in *Lemon II*.

The State, in addition to its argument of Federal unconstitutionality, also contends that the payment of the claim herein would constitute a gift of State money to a private corporation in violation of section 8 of Article VII of the New York Constitution or an audit by the Legislature of a private claim in violation of section 19 of Article III of the New York Constitution.

It is well settled that the Legislature can direct the payment of claims founded in equity and justice, even though the claim itself would not be enforceable in a court of law (*Oswego & Syracuse R.R. Co. v. State of New York*, 226 N.Y. 351; *Lehigh Valley R.R. Co. v. Canal Board*, 204 N.Y. 471). In order to justify the Legislature in recognizing a claim against the State based upon a moral obligation or founded on conceptions of equity and justice, there must be present an obligation which would be recognized by men with a keen sense of honor and a real desire to act fairly and equitably without compulsion of law (*Ausable Chasm Co. v. State of New York*, 266 N.Y. 326). In the present case, the sole reason why the claimant did not receive payment for the second semester of the 1971-1972 school year was the fortuitous circumstance that the declaration of unconstitutionality by the courts came before the date set for the payment of the second installment but after the rendering of by far the greater part of the services required. Thus, the great bulk of the mandated services which the claimant was expected to perform and for which, in turn, the claimant expected compensation had already been rendered prior to the issuance of the permanent in-

## APPENDIX B — Opinions in Appellate Division.

junction on June 1, 1972. Consequently, the equitable considerations present in *Lemon II* are, if anything, heightened. In the course of its decision in *Hecht Co. v. Bowles* (321 U.S. 321, 329) the Supreme Court addressed itself to these considerations and held that

[f]lexibility rather than rigidity has distinguished [them]. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs.

Sections 1 and 2 of chapter 996 of the Laws of 1972 amply spell out a basis which would justify recognition of the instant claim as a moral obligation and/or founded on concepts of equity and justice.

The purpose of section 19 of Article III of the New York Constitution was "to remedy the manifest evils of special legislation in the interest of private claimants" (*Bd. Suprs. of Cayuga Co. v. State of New York*, 153 N.Y. 279, 288). It is readily apparent that chapter 996 is not designed to provide a recovery for any single institution and is applicable to a class which cannot readily be classified as constituting a private special interest. Accordingly, this contention of the Attorney General is without any particular merit.

Upon approaching chapter 996 it must be remembered that it is supported by a presumption of constitutionality which is not easily overcome. In addition to the presumption, it appears that this one-time payment falls within the realm of that which is constitutionally permissible pursuant to the decision of the Supreme Court in *Lemon II* (*supra*).

APPENDIX B — *Opinions in Appellate Division.*

However, it is readily apparent that it was never the intent of the Legislature that any of its funds were to be allowed for the furtherance of religious purposes. In this regard, the audit of the claims by the Court of Claims must serve the same purpose as the final post audit which was referred to in *Lemon II* (*supra*). Accordingly, the burden will be upon the claimant to prove that the items of its claim are in fact solely for mandated services and the burden will be upon the Court of Claims to make appropriate findings in regard thereto.

This dissent may be concluded by observing that in *Lemon II* the court noted that the application of familiar equitable principles must be measured against the totality of circumstances and in the light of the general principle that, absent contrary direction, State officials and those with whom they deal are entitled to rely on a presumptively valid State statute, enacted in good faith and by no means plainly unlawful.

The judgment of the Court of Claims should be reversed and the claim reinstated.

## APPENDIX C — Order of the Court of Appeals.

Court of Appeals  

---

*State of New York, ss:*

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of June in the year of our Lord one thousand nine hundred and seventy-six, before the Judges of said Court.

WITNESSES,

The HON. CHARLES D. BREITEL,  
Chief Judge, *Presiding.*

JOSEPH W. BELLACOSA, Clerk

3	No.
Cathedral Academy,	<i>Appellant,</i>
vs.	
The State of New York,	<i>Respondent.</i>

*Be it Remembered,* That on the 20th day of November in the year of our Lord one thousand nine hundred and seventy-five Cathedral Academy the appellant in this cause, came here unto the Court of Appeals, by Davis Polk & Wardwell, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And The State of New York the respondent in said cause, afterwards

## APPENDIX C — Order of the Court of Appeals.

appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Richard E. Nolan of counsel for the appellant, and by Mrs. Jean M. Coon of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, with costs, and the claim reinstated on the dissenting opinion by then Presiding Justice J. Clarence Herlihy at the Appellate Division (47 A D 2d 390, 396). All concur except Breitel, Ch. J., Jasen and Jones, JJ., who dissent and vote to affirm on the opinion by Mr. Justice Louis M. Greenblott at the Appellate Division.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Court of Claims there to be proceeded upon according to law.

Therefore, it is considered that the said order is reversed &c., AS AFORESAID.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises are by the said Court of Appeals remitted into the Court of Claims before the Judge thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record

## APPENDIX C — Order of the Court of Appeals.

now remains in the said Court of Claims before the Judge thereof, &c.

s/ JOSEPH W. BELLACOSA  
Clerk of the Court of Appeals of the  
State of New York

Court of Appeals, Clerk's Office,  
Albany, July 13, 1976.

( SEAL )

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

s/ JOSEPH W. BELLACOSA

APPENDIX D — Notice of Appeal to the Supreme Court  
of the United States.

STATE OF NEW YORK : COURT OF CLAIMS

CATHEDRAL ACADEMY,

*Claimant-Appellee,*

— against —

THE STATE OF NEW YORK,

*Respondent-Appellant.*

Claim Number

NOTICE OF APPEAL TO THE SUPREME  
COURT OF THE UNITED STATES

Notice is hereby given that the State of New York, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York, entered in this action on the 13th day of July, 1976, reversing an order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, entered May 6, 1975, which affirmed a judgment of the Court of Claims, entered April 22, 1974, holding Chapter 996 of the New York Laws of 1972 unconstitutional and in violation of the First Amendment to the Constitution of the United States, and appellant appeals from each and every part of said judgment.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257, subparagraph 2.

APPENDIX D — Notice of Appeal to the Supreme Court  
of the United States.

Dated: Albany, New York  
August 31, 1976

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York

By: JEAN M. COON  
Assistant Solicitor General  
Attorney for Respondent-  
Appellant  
The Capitol  
Albany, New York 12224  
Tel. (518) 474-7138

TO: HON. LAWRENCE WAYNE  
Chief Clerk  
Court of Claims  
Justice Building  
Empire State Plaza  
Albany, New York 12223

DAVIS, POLK & WARDWELL, ESQS.  
One Chase Manhattan Plaza  
New York, New York 10005  
Attorneys for Claimant-Appellee

## APPENDIX E — Chapter 996 of the 1972 Laws of New York.

**CLAIMS AGAINST STATE—NONPROFIT SCHOOLS**  
**CHAPTER 996**

**An Act to confer jurisdiction upon the court of claims to hear, audit and determine the claim or claims of nonprofit schools, other than public schools for expenses incurred in rendering certain mandated services.**

**Approved and effective June 8, 1972.**

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

**Section 1. Jurisdiction is hereby conferred upon the court of claims to hear, audit and determine the claim or claims of nonprofit schools in the state, other than public schools, against the state for reimbursement of the funds expended by them in rendering services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports required by law or regulation. The base of said claim or claims is that the State of New York represented to said schools that they would be reimbursed for such expenses incurred after July first, nineteen hundred seventy; that the said State knew that said schools were relying on said representation; that said representation**

## APPENDIX E — Chapter 996 of the 1972 Laws of New York.

was an effective cause of said expenses by said schools; and that without any fault on the part of said schools complete reimbursement has not been paid to them, though due and owing. As such, said claim or claims are founded in right and justice, or in law or equity.

§ 2. In hearing, auditing and determining such claim or claims, the court of claims is hereby authorized to consider, inter alia:

(a) That prior to July first, nineteen hundred seventy, said nonprofit schools, rendered services for examination and inspection in connection with administering, grading and the compiling and reporting of the results of tests and examination, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualification and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation;

(b) That by a chapter of the laws of nineteen hundred seventy, it was determined and declared as a matter of legislative finding:

“That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as

*APPENDIX E — Chapter 996 of the 1972 Laws of New York.*

required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.

And that nonpublic schools of the state are responsible for the education of more than eight hundred fifty thousand pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools which these children attend in fulfillment of the above state purposes are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonable assisting such services."

(c) That in furtherance of said policy, appropriations were made to the education department to enable the department to reimburse such schools for the rendering of such services;

(d) Based on the representation of the State that reimbursement would be made for such services, such schools already in fiscal crisis, by budgetary allocations and other methods made available the necessary personnel to perform such services;

(e) That the federal courts, by various orders enjoined payments to such schools. As a result reimbursement for the full period July first, nineteen hundred seventy-one to June thirtieth, nineteen hundred seventy-two, has not been made to such schools, although all such services were or will be duly performed;

*APPENDIX E — Chapter 996 of the 1972 Laws of New York.*

(f) That such schools during such period did incur expenses in providing the mandated services in reliance upon said representation of reimbursement;

(g) That but for this claim or claims complete reimbursement to such schools would not be made and such schools are thus without legal right to recover for said expenses;

(h) That the legislature recognizes a moral obligation to provide a remedy whereby such schools may recover the complete amount of expenses incurred by them prior to June thirtieth, nineteen hundred seventy-two in reliance on the said representation.

§ 3. If the court finds that such claim or claims or any of them were founded in right and justice or in law and equity against the state of New York, and are in right and justice presently payable thereby, the state shall be deemed to have been liable therefor and such claim or claims shall constitute legal and valid claims against the state, and the court may award and render judgments for the claimants as shall be just and equitable, notwithstanding the lapse of time since any such claim or claims or any parts thereof accrued, or the failure to do any act in relation to the presentation of such claims or any of them within the time prescribed by law, but no award shall be made or judgment rendered hereunder against the state unless such claim shall be filed with the court of claims within ninety days from the passage of this act, nor if such claim, as between citizens of the state, would be barred by lapse of time.

§ 4. This act shall take effect immediately.

APR 5 1977

MICHAEL RODAK, JR., CLERK

(H-40)

APPENDIX

In The  
**Supreme Court of the United States**

OCTOBER TERM, 1976

\_\_\_\_\_  
No. 76-616  
\_\_\_\_\_

THE STATE OF NEW YORK,

*ant*  
Appellee,

— against —

CATHEDRAL ACADEMY,

*ll*  
Appellant.

\_\_\_\_\_  
APPEAL FROM THE COURT OF APPEALS  
OF THE STATE OF NEW YORK  
\_\_\_\_\_

Filed October 29, 1976

Jurisdiction Postponed February 22, 1977

## TABLE OF CONTENTS

	Page
Docket Entries .....	1
Notice of Motion for Summary Judgment .....	2
Affidavit of Leo P. O'Brien .....	4
Exhibits attached:	
A. Form SA-170, Application for Reimbursement, School Year 1971-72 .....	7
B. Claim, filed 9-6-72 .....	12
Transcript of Proceedings .....	15
Opinion of the New York Court of Claims .....	44
Appendices attached:	
A. Ch. 996 of the Laws of New York 1972 .....	58
B. Ch. 138 of the Laws of New York 1970 .....	62
Judgment of the New York Court of Claims .....	66
Notice of Appeal to Appellate Division of the New York Supreme Court .....	68
Opinions in Appellate Division, dated 4-24-75 .....	70
Order of the Appellate Division Appealed From .....	71
Notice of Appeal to the New York Court of Appeals .....	73
Memorandum Decision of the Court of Appeals .....	75
Order of the Court of Appeals, dated 7-13-76 .....	76
Notice of Appeal to the Supreme Court of the United States .....	77

**DOCKET ENTRIES.**

New York State Court of Claims

Claim No. 56557

<u>DATE</u>	<u>PROCEEDINGS</u>
September 6, 1972	Claim filed
November 23, 1973	Motion by claimant for summary judgment filed (Motion Number M-15976).
December 26, 1973	File Stipulation of Substitution of Counsel for Claimant.
April 2, 1974	Decision filed
April 22, 1974	Judgment dismissing claim filed
May 15, 1974	Notice of Appeal to Appellate Division, Third Department, filed.
May 6, 1975	Order of Appellate Division affirming judgment, filed.
May 29, 1975	Notice of Appeal to the Court of Appeals, filed
July 15, 1976	Remittitur of New York State Court of Appeals filed.
December 16, 1976	Judgment following decision in Court of Appeals, filed.

## NOTICE OF MOTION FOR SUMMARY JUDGMENT.

COURT OF CLAIMS  
STATE OF NEW YORK

Claim No. 56557

---

[SAME TITLE]

---

PLEASE TAKE NOTICE, that upon the annexed affidavit of Leo P. O'Brien, verified the 20th day of November, 1973, and upon the Claim herein, the above Claimant, by its attorney, Charles J. Tobin, Jr., will move this court at motion term to be held at the Court of Claims, South Mall Justice Building, Albany, New York, on the 4th day of December, 1973 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order directing the entry of summary judgment for claimant upon the claim attached to the motion papers and further relief as may seem just and proper.

Dated: Albany, New York  
November 20, 1973

## NOTICE OF MOTION FOR SUMMARY JUDGMENT.

Yours, etc.,

CHARLES J. TOBIN, JR.

*Attorney for Claimant*

Office and P. O. Address

100 State Street

Albany, New York

To:

HON. LOUIS J. LEFKOWITZ

*Attorney General of the State of New York*

Office and P. O. Address

State Capitol

Albany, New York

CLERK OF THE COURT OF CLAIMS

Office and P. O. Address

Governor Alfred E. Smith Office Building

Albany, New York

## AFFIDAVIT OF LEO P. O'BRIEN.

STATE OF NEW YORK  
COURT OF CLAIMS

[SAME TITLE]

STATE OF NEW YORK,  
COUNTY OF ALBANY, ss.:

LEO P. O'BRIEN, being duly sworn, deposes and says:

1. I am Vice President of Cathedral of the Immaculate Conception and am fully familiar with the facts and circumstances herein. I make this affidavit in support of claimant's motion for summary judgment.

2. On June 8, 1972, Chapter 996 of the 1972 Laws of New York became law, conferring jurisdiction upon this Court

to hear, audit and determine the claim or claims of nonprofit schools in the state, other than public schools, against the state for reimbursement of the funds expended by them in rendering services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports required by law or regulation. The base of said claim or claims is that the State of New York represented to said

## AFFIDAVIT OF LEO P. O'BRIEN.

schools that they would be reimbursed for such expenses incurred after July first, nineteen hundred seventy; that the said State knew that said schools were relying on said representation; that said representation was an effective cause of said expenses by said schools; and that without any fault on the part of said schools complete reimbursement has not been paid to them, though due and owing. As such, said claim or claims are founded in right and justice, or in law or equity.

3. Claimant, both before and after July 1, 1970, has rendered services for examination and inspection in connection with administering, grading and the compiling and reporting of the results of tests and examination, maintenance or records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualification and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation.

4. Subsequent to the passage of Chapter 138 of the 1970 Laws of New York, claimant became eligible for reimbursement by the State for the costs incurred in providing the above services.

5. Claimant duly applied and was reimbursed by the State for the costs it incurred in providing the above services mandated by law for the school year 1970-71.

6. Claimant budgeted for, and relied on eventual receipt of, similar reimbursement pursuant to Chapter 138 for the school year 1971-72.

*AFFIDAVIT OF LEO P. O'BRIEN.*

7. Claimant duly filed an application for reimbursement, State Education Department Form SA-170, for the school year 1971-72. A true copy of the Form SA-170 is appended hereto as Exhibit A.

8. In January, 1972, claimant received a payment from the State in the amount of \$7,347.28 as reimbursement for the costs it incurred in providing the services mandated by law for the first half of the school year 1971-72.

9. Claimant provided the above services for the remainder of the school year 1971-72, but it has not yet been reimbursed for so doing.

10. The instant claim, a copy of which is appended hereto as Exhibit B, was filed on September 6, 1972.

11. No other request for the relief prayed for herein has been made.

WHEREFORE, it is respectfully requested that claimant's motion for summary judgment be granted, and that judgment be entered on behalf of the claimant in the amount of \$7,347.29.

/s/ LEO P. O'BRIEN

Sworn to before me this  
20th day of November, 1973.

/s/ JAMES W. SANDERSON

[Stamp]

Exhibit A — Form SA-170, Application for Reimbursement,  
School Year 1971-72 attached to O'Brien Affidavit.

THE UNIVERSITY OF THE STATE OF NEW YORK  
THE STATE EDUCATION DEPARTMENT  
OFFICE FOR NONPUBLIC SCHOOL SERVICES  
WASHINGTON AVENUE  
ALBANY, NEW YORK 12224

MANDATED SERVICES  
APPLICATION FOR NONPUBLIC SCHOOL  
APPORTIONMENT  
CHAPTER 138 OF THE LAWS OF 1970

1971-72 School Year \_\_\_\_\_

Form SA-170

INSTRUCTIONS

Each nonpublic school meeting the requirements set forth in the Guidelines and desiring to make application for aid based on attendance should complete two copies of this application in pen or by typewriter. The Guidelines contain detailed instructions for completing this application. One completed copy of this application must be filed with the Office for Nonpublic School Services by October 1. One copy should be retained by the school.

1. Name of nonpublic school CATHEDRAL ACADEMY
2. Identification No. 01-01-00-11-5670
3. Location No. and Street 75 Park Avenue  
City, Town or Village Albany N.Y.  
Zip Code 12202 County Albany
4. Mailing address of school  
No. and Street 75 Park Avenue  
Post Office \_\_\_\_\_ N.Y.  
Zip Code 12202 County Albany
5. Name of corporate entity ALBANY DIOCESAN  
SCHOOL BOARD, INC.
6. Mailing address of entity  
No. and Street 40 North Main Avenue  
Post Office \_\_\_\_\_ N.Y.  
Zip Code 12202 County Albany

*Exhibit A — Form SA-170, Application for Reimbursement,  
School Year 1971-72 attached to O'Brien Affidavit.*

7. Date school registered \_\_\_\_\_
8. Registered name \_\_\_\_\_
9. Date entity incorporated October 23, 1971
10. Incorporation name ALBANY DIOCESAN SCHOOL  
BOARD, INC.
11. Religious affiliation ROMAN CATHOLIC
12. Name of person completing this form Sister Anne Martin,  
C.S.J.
13. Telephone of person completing this form 448-5222  
(Area Code) 518

I, REVEREND THOMAS J. MALONEY the undersigned, do hereby make application to the Commissioner of Education for the apportionment provided for in Chapter 138, Laws of 1970 and further certify with reference to the nonpublic school above that:

1. It is a nonprofit school in the State, other than a public school, which provides instruction in accordance with section 3204 of the Education Law.
2. It is providing instruction for all students without regard to race, color, religion, creed or national origin. If the school is a religious or denominational educational institution, students otherwise qualified have the equal opportunity to attend therein without discrimination because of race, color or national origin in accordance with section 313 of the Education Law, and the school has filed with the Commissioner a statement in accordance with section 313 of the Education Law. (NEW APPLICATION ONLY)
3. It is keeping an accurate record of the attendance of minor children attending such school in the form prescribed by the Commissioner in accordance with section 3211 of the Education Law.

*Exhibit A — Form SA-170, Application for Reimbursement,  
School Year 1971-72 attached to O'Brien Affidavit.*

4. It is providing equivalent instruction for all children in the first eight grades in arithmetic, reading, spelling, writing, English language, geography, United States history, civics, hygiene, physical training, New York State history and science, and in grades nine through twelve in English, civics, and American history, in accordance with section 3204 of the Education Law.
5. It is observing the provisions of sections 801-811 and is providing instruction in the special areas required by the Education Law as follows:
  - a) Patriotism and citizenship for all pupils over eight years of age;
  - b) Correct use and display of the flag;
  - c) Physical training for all pupils over eight years of age;
  - d) Physiology and hygiene, including the nature and the effects on the human system of:
    - 1) alcoholic drinks
    - 2) narcotics and habit-forming drugs (applies to courses of study beyond the first eight years);
  - e) The provisions of the Constitution of the United States in the eighth and higher grades;
  - f) Highway safety and traffic regulations;
  - g) Fire prevention and fire drills;
  - h) Observe Conservation Day and provide instruction in this area;
  - i) The humane treatment of animals and birds (in the elementary grades);
6. It is staffed by teachers who are certified by the Commissioner or who meet all the requirements of the school in which they teach for the position in which the teacher serves, as certified by the chief administrative officer of the school.
7. It is complying with section 3002 of the Education Law by having all teachers in the school take the oath of allegiance.
8. It is conducting three civil defense shelter drills during each school year.

*Exhibit A — Form SA-170, Application for Reimbursement,  
School Year 1971-72 attached to O'Brien Affidavit.*

9. It has submitted the attendance report AT6N, Secondary School Reports and Basic Educational Data System (BEDS) Report as applicable and as required in accordance with the Commissioner's Regulations and these Guidelines.
10. It has submitted the Pupil Evaluation Program Tests for third and sixth grades. Pupils who normally will be taking Regents or equivalent level courses are considered to be above the minimum competence level of the ninth-grade reading and arithmetic tests and may be excused from taking these tests.
11. It has submitted the Certificate of Religious or Denominational Institution as required by section 313 of the Education Law in those instances wherein the school has elected to request such exceptions.

Affidavit of Chief Administrative Officer

(All nonpublic schools must complete Part I; nonpublic schools which are not incorporated must complete Part II.)

State of New York                    ) ss  
County of Albany                    )

Reverend Thomas J. Maloney Chief Administrative Officer of Cathedral Academy, Albany, being duly sworn, deposes and says that all statements in this application are true to the best of his knowledge.

Signature /s/ Thomas J. Maloney  
Chief Administrative Officer

Title Superintendent of Schools

*Exhibit A — Form SA-170, Application for Reimbursement,  
School Year 1971-72 attached to O'Brien Affidavit.*

I, Reverend Thomas J. Maloney, the undersigned do certify that the corporate entity to which apportionments shall be made in behalf of Cathedral Academy, Albany school is as follows Albany Diocesan School Board, Inc. and request that the Commissioner of Education approve such corporate entity for the purposes of Chapter 138 of the Laws of 1970.

Signature /s/ Thomas J. Maloney  
Chief Administrative Officer

Title Superintendent of Schools

Subscribed and sworn to before me this 5th  
day of November 1971.

/s/ [Signature Illegible]  
Notary Public

Exhibit B — Claim, filed 9-6-72  
attached to O'Brien Affidavit.

STATE OF NEW YORK  
COURT OF CLAIMS

Justice Bldg., South Mall  
Albany, N. Y. 12223

John J. Clark  
Chief Clerk of the Court

FRED A. YOUNG  
Presiding Judge  
RICHARD S. HELLER  
SIDNEY SQUIRE  
RONALD E. COLEMAN  
JOHN H. COOKE  
JOHN P. GUALTIERI  
DOROTHEA E. DONALDSON  
HENRY W. LENGUEL  
MILTON ALPERT  
DANIEL BECKER  
ADOLPH C. ORLANDO  
ROBERT J. MANGUM  
JOSEPH MODUGNO  
ROBERT M. QUIGLEY  
FRANK S. ROSSETTI  
Judges

September 11, 1972

Charles J. Tobin, Jr., Esq.  
100 State Street  
Albany, New York 12207

Dear Sir:

This is to acknowledge receipt in this office on September 6, 1972 of original and twelve copies of the claim of \_\_\_\_\_  
CATHEDRAL ACADEMY  
\_\_\_\_\_ against the STATE OF NEW YORK, the  
amount claimed being \$ 7,347.29.

Said claim has been filed in this office as of September 6, 1972 subject to whatever legal objections may apply thereto and has been given the claim No. 56557.

Exhibit B — Claim, filed 9-6-72  
attached to O'Brien Affidavit.

Your attention is directed to letter of Presiding Judge Fred A. Young, a copy of which is enclosed.

Very truly yours,

/s/ John J. Clark

JOHN J. CLARK  
CHIEF CLERK

JJC:kvp  
Enc.

State of New York—Court of Claims

Cathedral Academy, Claimant

against

Claim No. \_\_\_\_\_

THE STATE OF NEW YORK

1. The post office address of the claimant herein is 75 Park Avenue, Albany, New York.

2. This claim is made pursuant to Chapter 996 of the Laws of 1972 for funds expended by claimant as set forth in said chapter; a copy of which is incorporated herein by reference.

3. The claimant duly made application under Chapter 138 of the Laws of 1970 for reimbursement for services rendered in the school year 1971-72 and received payment in 1972 of one-half of the annual sum provided by such law.

4. The claimant operates a nonprofit, nonpublic school duly existing under the laws of New York, and has rendered the services referred to in Chapter 996 of the Laws of 1972 and is entitled to such reimbursement in full as provided by Chapter 138 of the Laws of 1970.

5. This claim is filed on or before September 6, 1972 as required by Chapter 996 of the Laws of 1972.

*Exhibit B — Claim, filed 9-6-72  
attached to O'Brien Affidavit.*

6. The particulars of claimant's damages are listed in the print-out sheets supplied by the Department of Audit and Control, State of New York, showing the second half payment under the Mandated Services Act due and payable no later than June 15, 1972. A copy of the relevant portion is incorporated by reference.

7. Wherefore, claimant demands judgment against the State of New York for the sum of \$ 7,347.29.

Charles J. Tobin, Jr.  
Attorney for Claimant

Office and Post Office Address  
100 State Street  
Albany, New York 12207

STATE OF NEW YORK

ss:

COUNTY OF Albany

Leo P. O'Brien, being duly sworn, deposes and says that deponent is the Vice-President of claimant, Cathedral of the Immaculate Conception the corporation named in the within action; that deponent has read the foregoing claim and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because Cathedral of the Immaculate Conception, is a corporation. Deponent is an officer thereof, to-wit, its Vice-President

/s/ Leo P. O'Brien

/s/ Anne G. Walton

Sworn to before me, this  
day of 24, August, 1972

ANNE G. WALTON

Notary Public, of New York State  
Qualified in Albany County

**TRANSCRIPT OF PROCEEDINGS.**

At a Motion Term of the Court of Claims  
of the State of New York, held in the  
Justice Building, City and County of  
Albany, on the 21st day of December,  
1973.

[SAME TITLE]

Before:

HONORABLE WILLIAM L. FORD,  
*Judge of the Court of Claims.*

Appearances:

*For the Claimant:*

DAVIS POLK & WARDWELL, Esqs.,  
1 Chase Manhattan Plaza,  
New York, N. Y.

By: RICHARD E. NOLAN, Esq., and  
THOMAS J. AQUILINO, Jr., Esq.,  
*of Counsel.*

*For the State:*

HONORABLE LOUIS J. LEFKOWITZ,  
*Attorney General.*

By: KENNETH J. CONNOLLY,  
*Assistant Attorney General.*

*Claimant's Motion for Summary Judgment*

THE COURT: Scheduled for argument this morning is Motion No. M-15976 in Claim No. 56557, Cathedral Academy, Claimant, against the State of New York.

Are both sides ready on the motion?

MR. NOLAN: Ready for the Claimant.

MR. CONNOLLY: The State is ready, Your Honor.

THE COURT: The Claimant may proceed.

You are Mr. Nolan?

MR. NOLAN: I am Richard E. Nolan of Davis, Polk & Wardwell of New York City. We represent Cathedral Academy in this claim.

This is a motion by Cathedral Academy for summary judgment on its claim in the amount of \$7,347.29, which claim was filed pursuant to Chapter 996 of the Laws of 1972, which was a statute enacted by the legislature, which sought to provide a means of reimbursing to non-public schools certain funds which these schools had budgeted for and expended in reliance on the provisions of the Mandated Services Act, which was declared unconstitutional by the United States District Court for the Southern District of New York in the Spring of 1972, which decision was, thereafter, affirmed by the Supreme Court by an eight to one margin in 1973, June.

What is being sought here, Your Honor, is not any sort of prospective relief. What we are seeking here is to obtain for Cathedral Academy the money which it had budgeted for and expended and which it would have received but for the decision of the District Court, which came down in the middle of the spring. The funds we are talking about here constitutes one-half of the amount Cathedral Academy would be entitled to receive in the 1971-1972 school year.

*Claimant's Argument for Motion*

The State had already paid the first installment prior to the District Court's decision. The District Court's decision came down in the spring—the middle of the spring term; the judgment on that decision was not entered until June 1 of 1972, by which time the commitments of Cathedral Academy and various other schools had already become fixed in terms of budgeting and so forth, which had been established earlier in the year.

If I could back up just a moment? The reason for the enactment of Chapter 996 was to alleviate the condition of the non-public schools with respect to these Mandated Services Funds. If I may briefly describe the sequence of events in Mandated Services, in which my firm was counsel for a number of non-public schools, including Cathedral Academy, as intervenors.

In 1970, July 1970 the legislature enacted the Mandated Services Act. This was a substitute that was intended to provide funds to the non-public schools for services, which they were required to perform under various State laws, for example, the keeping of attendance records; the administration of examinations; all of these things were matters which were mandated by State law. The legislature felt that since these were mandated by State law it was only fair that the State should compensate the non-public schools for services, which they were required by State law to do and which perhaps if they did not do these services, perhaps the State would have to step in and do it, as for example, maintain attendance records by having a State employee in the school to make sure that these records were properly kept and so forth, and it was felt that it would be better to have this done by the schools themselves and a formula was

*Claimant's Argument for Motion*

worked into the Statute with respect to the amount that was on a per pupil basis with the amounts varying in high school and in elementary school. This act was enacted in July 1970 to become effective September 1970, the beginning of the following year. On July 30, 1970 an organization known as the Committee For Public Education and Religious Liberty brought suit against the Governor, the Comptroller, Commissioner of Education claiming that the Mandated Services Act violated the First Amendment of the Federal Constitution. Nothing was done in that case with respect to moving it forward to final determination. I believe it fair to say that the plaintiffs did not press those cases because of the fact that there were several cases working their way up to the Supreme Court of the United States from Pennsylvania and from Rhode Island and these cases ultimately were decided in 1971.

It is the Lemon against Kurtzman case, the first case; another case was Tilton involving the Connecticut statute providing building funds, but there was a period of time when the plaintiffs in the Mandated Services Act, for their own reasons, decided they were not going to press on. They did not seek a temporary injunction or preliminary injunction when they brought the suit. The case remained in a pretty much state of dormancy after it was filed in July of 1970.

In the Spring of 1971 the State made payments for the 1970-'71 school year. In January of 1972 the State made payment for one-half of the '71-'72 school year. What we are talking about here is that latter half-year payment. Now, after the State made its payment of the first portion of the '71-'72 school year the plaintiffs in the Spring of

*Claimant's Argument for Motion*

1972 then moved for a preliminary injunction and this was argued before a Three-Judge District Court in the United States District Court for the Southern District of New York on April 11, 1972. At that time, after argument, Judge Hays, who was the Presiding Judge, granted a stay pending the determination of the motion, stay against any further payments and the decision came down on April 27, 1972, in which the Three-Judge Court by a two to one margin, with Judge Palmieri dissenting, held the Mandated Services Act to be a violation of the First Amendment. Judgment was entered on that decision on June 1, 1972. The case was, thereafter, appealed to the United States Supreme Court and it was argued in that Court in the Spring of 1973. A decision came down, I believe, the latter part of June of this year affirming that decision by an eight to one margin with Justice White dissenting, but with a, what I believe, is a fairly clear indication that the Court was not condemning the Mandated Services concept, as such. It was simply saying that certain expenses, such as the expense of administering certain types of tests might be intertwined with religious influences and, thereafter, the statute as drawn could not be upheld. I believe it fair to say that the Court did indicate that a more narrowly drawn statute, which limited itself perhaps to the cost of administering regent examinations or other specifically mandated examinations, the cost of maintaining health records, the cost of maintaining attendance records and things like that, might very well pass constitutional muster.

Now, what has happened here, as indicated in the affidavit of Father O'Brien in support of the motion for the summary judgment, is that these schools—many, many schools,

*Claimant's Argument for Motion*

not just Cathedral Academy, many schools—relied upon the expectation of receiving these appropriated funds and because of vagaries of litigation, if you will, it was not until the middle of the Spring Semester when the Three-Judge District Court came down with its decision. It was not until June 1, '72 that the injunction was entered. So that what we have is a situation where these schools, relying upon a statute passed by the legislature, as to which they had received in the past year Mandated Services Funds, they had budgeted, made their plans on this basis and in the middle of the Spring Semester the statute is declared to be unconstitutional by the District Court, subject to appeal. At that point the schools were committed in terms of funds. There is no realistic way by which they could cut back at that point and what we are asking here is that the provisions of Chapter 996, which seek to provide an equitable remedy—I believe the statute talks about the fact that the schools have relied upon representations that they were going to receive these funds—it would be only fair and equitable that they are not deprived of these funds. I think that provisions of Chapter 996 should be applied here. I don't think there is any issue of fact that has been raised by the Attorney General. I think it is basically a legal issue.

Now, there is a case which is cited in our brief, which is referred to as *Lemon against Kurtzman II*, which I think is very, very pertinent to this situation.

If I may briefly recount what happened in that case?

Pennsylvania adopted a statute, which provided a means by which the Pennsylvania Legislature sought to pay a portion of the salaries of teachers in non-public schools

*Claimant's Argument for Motion*

with respect to the teaching of secular subjects. This statute was challenged in Pennsylvania in the Federal Court and the Federal Court dismissed the complaint, upholding the statute. Thereafter, the Supreme Court by a split vote and noting in that case, as I believe it noted in the *Mandated Services* case or one of the other decisions that came down, that we can only dimly perceive the boundaries of this extraordinary First Amendment problem. The Supreme Court by a split vote reversed and held the Pennsylvania Statute unconstitutional. It went back to the District Court and the District Court entered a judgment enjoining any further payments, but allowing payments to be made for the school year, which had just closed. I think the Supreme Court decision came down the end of June and the District Court allowed payment for the year or half-year that preceded since the schools expended the money in reliance upon the assumption that the statute was valid. The case went back up to the Supreme Court and the Supreme Court, in a decision which we have attached to our brief, held that where you have a situation of a statute that—as to which there is a reasonable constitutional question, that where there is reliance upon the statute in terms of expenditures of money, and so forth, that the declaration of unconstitutionality will not apply retroactively and while payments cannot be made for future services, payments can be made for services rendered during the period of the prior time when the persons involved have relied upon the actions of the legislature, relied upon the actions of the Courts.

Now, in this case, in *Mandated Services*, we have a case where the constitutional issues were by no means clear.

*Claimant's Argument for Motion*

We have the fact that in the District Court, Three-Judge District Court, consisting of Judge Hays of the United States Court of Appeals and two District Court Judges, there was a split. There was a dissenting opinion by Judge Edmund Palmieri. The case then was appealed to the United States Supreme Court and under the Court's procedure, there is a procedure for a motion by the appellee, the respondent, to dismiss the appeal for want of a substantial Federal question. Now, if the Supreme Court feels that the decision was right and presents no important constitutional questions, the practice is to affirm summarily and dismiss the appeal for want of a Federal question as opposed to allowing the case to proceed on for full brief and argument. The Supreme Court denied a motion by the plaintiffs-appellees in Mandated Services to dismiss for want of a substantial Federal question; set the case down for full argument. It was argued. As I said before, there was a split in the Court with Justice White dissenting. I think it fair to say that even the majority would not hold the concept of Mandated Services—reimbursement for Mandated Services to be unconstitutional. What they were objecting to, I think, was the inclusion of certain types of services, which went beyond the attendance records and health records. I think that the case that we have here was quite similar to Lemon II. We have the situation here where the first determination of unconstitutionality came at the end of April; the judgment was entered June 1st and by that time, for all practical purposes, the school year had progressed to the point where no important financial changes could be made in the schools' operations. The schools had depended on Mandated Serv-

*State's Cross-Motion for Summary Judgment*

ices. The legislature had sought to provide it to them by a vagary of litigation. This was cut off in the middle of the school year. Chapter 996 was enacted for the specific purpose of remedying this inequitable situation. I think under Chapter 996 and under the specific precedent of the second Lemon case, I think that summary judgment is warranted here.

Thank you very much.

THE COURT: Mr. Connolly.

MR. CONNOLLY: Thank you, Your Honor.

Before I begin, on Page 4 of my brief, the last sentence says "The claim was filed on September 9, 1972." That is an incorrect date. The date should be September 6th. So there is no misunderstanding, we have not raised any statute of limitations argument. Then on the last page, in the conclusion, the word "claimant" should be "defendant". I apologize. I wrote this brief hurriedly yesterday and I apologize to the Court and counsel for any inconvenience.

We have asked that summary judgment be granted to the State dismissing the claim and we have raised two grounds, the first of which is that the Enabling Act itself is unconstitutional and I briefed that point and I will not get into it at this time. I would like to, instead, pass on to discussion of the case of Lemon against Kurtzman because, frankly, I think that case would be rather dispositive of the issues in this particular case. I think to fully understand the import of that, it is—first it is necessary to lay out a chronology of events.

First of all, in the Lemon case—in the Lemon case the statute—Pennsylvania statute became a law in June of 1968. The action was commenced a year later, in June of

*State's Argument for Cross-Motion*

1969, and at that time the State had entered into contracts with school districts and the contracts were implemented and payments were being made. On November 29, 1969 the Three-Judge District Court in Pennsylvania granted the motion to dismiss the complaint. In April of 1970 the Supreme Court noted probable jurisdiction and in September of '70 the schools began rendering services for the 1970-'71 school year and January of '71 the same schools entered into contracts with the State to provide services for that school year and in June of '71 the Supreme Court declared the statute to be unconstitutional and they remanded it back to the District Court. What is important to note, I believe, is at that point the contracts themselves were entered into and the services were performed after the District Court had declared the act to be unconstitutional and dismissed the claim. That is a different situation than what we are faced with here and the basic distinction between the two cases, I believe, as it is found in the decision of the Court itself, the Supreme Court, is that the Pennsylvania statute provided that when the services were being rendered in order to insure that the money was being used for non-religious purposes, there was an elaborate audit procedure set up whereby the State Auditor General had to audit financing of the schools to insure that the money was going for strictly secular purposes. The Supreme Court took exception to this setup and, in effect, said by doing this, by requiring this auditing the State of Pennsylvania was involved in excessive entanglement in religion and they struck the statute down. On remand the District Court did allow payment to be made for the balance of the 1970-'71 school

*State's Argument for Cross-Motion*

year, but what the District Court held and what the Supreme Court held was that they took exception to the fact that there was an elaborate auditing procedure established, which got the State involved in excessive entanglement with religion. Since they had enjoined any further operation of the statute, since the auditing, which they took exception to, was completed there was no further excessive entanglement. There could be no further entanglement. The unconstitutional practice itself had ceased and, therefore, there was no harm in making the final payment and no violence would be done to the decision that they previously rendered.

The Supreme Court in affirming in *Lemon II* said, at Pages 201 and 202, "... Act 109 required the Superintendent of Public Instruction to ensure that educational services to be reimbursed by the State were kept free of religious influences. Under the Act, the Superintendent's supervisory task was to have been completed long ago, during the 1970-1971 school year itself; nothing in the record suggests that the Superintendent did not faithfully execute his duties according to law. Hence, payment of the present undisputed sums will compel no further oversight of the instructional processes of sectarian schools."

In the *Levitt* case what the Court took exception to was not that the New York statute involved excessive entanglement. They took exception to the fact that there was no provision in the New York statute to supervise how the money was spent and there was no way of determining where the money went, whether for secular purposes or religious purposes, and that is what the Court excepted to and it was on that ground that the Court declared the

*State's Argument for Cross-Motion*

statute unconstitutional. In dismissing or in throwing the statute out the Supreme Court held—it is on the last page of the Court's decision—"We hold that the lump sum payments under Chapter 138 violate the Establishment Clause. Since Chapter 138 provides only for a single per-pupil allotment for a variety of specified services, some secular and some potentially religious, neither this Court nor the District Court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reimbursable secular services. This is a legislative, not a judicial function."

They are back in here asking that this Court authorize payment of exactly the same items that the Supreme Court said couldn't be paid and this statute is an attempt to do indirectly what couldn't be done directly. If the intent was originally made to provide payment under the Mandated Services Act the Supreme Court said you can't pay. We are back in here to pay the same amount not under the Mandated Services Act, but under the Enabling Act, but it was for the same purposes the United States Supreme Court said could not be reimbursed.

There is another distinction which I draw between the—this case and the Lemon against Kurtzman case. In Lemon II, at Page 206, the United States Supreme Court said: "It is argued though, that the schools were foolhardy to rely on any reimbursement by the State whatever, in view of the constitutional cloud over the Pennsylvania program from the outset. We conclude, however, that our holding in Lemon I decided an issue of first impression whose resolution was not clearly foreshadowed."

*State's Argument for Cross-Motion*

My point on that is this: That Lemon I was decided in June of 1971. The payment which the Claimant is seeking to be paid here is for services allegedly rendered in the Spring of 1972 and I think there is such a close parallel between the Pennsylvania statute and between the Mandated Services Act; both provided, basically, for the same payment by different methods; that it was no longer an issue of first impression existent and the resolution of this issue was clearly foreshadowed at that point with the decision of the United States Supreme Court in the Lemon I case and I think that is a basic distinction also in that. In view of that I think it was fairly obvious as to what the ultimate resolution of the case was going to be when it got to the United States Supreme Court.

I won't argue the constitutional issues that I raised with regard to the Enabling Act itself. I set that forth at length in my brief and, frankly, I don't think there is a need to belabor that argument. If counsel would like an opportunity to respond to that point in a reply brief, I have no objection, Your Honor. I make an oral cross-motion for summary judgment on behalf of the State and I ask the claim be dismissed.

Thank you, Your Honor.

Mr. Nolan: May I make one or two observations?

THE COURT: You may.

MR. NOLAN: I would like to file a very short reply. We received the State's brief yesterday afternoon and Mr. Connolly was very courteous in getting it to us, but I didn't have a chance to see this until I got up here this morning. I would like an opportunity to reply to it.

*Colloquy Re Motions*

THE COURT: I appreciate the situation and I am extending to you that privilege of filing a reply brief. How much time do you need?

MR. NOLAN: I would think if I could have a week—

THE COURT: You have a week.

MR. NOLAN: Let me just make one or two points briefly. The Attorney General indicated that he felt that the decision in the first Lemon case involving a Pennsylvania teacher supplement statute forecast the result of the Mandated Services Act. I don't think that is so for several reasons. As I indicated, if the decision in Mandated was forecast, clearly forecast by the decision in the first Lemon case, the Supreme Court under its practice should have granted the motion to dismiss the appeal. Instead it noted probable jurisdiction, which is its way of taking the case on for full argument and heard full argument.

In addition, I must say if the Attorney General felt that the decision was forecast by the first Lemon case, nobody told Mrs. Coon about it, the Deputy Solicitor General, because she was in there fighting as hard as she could in briefs and oral argument to maintain the constitutionality of the statute.

As I said before, there was a split in both the District Court and the Supreme Court.

I think we are dealing here with a very, very complex area, almost of shadow and light, with the Supreme Court taking a number of different tacks every time a major church case comes up before it. It is hard to say anything, including the ultimate decision in Mandated Services was at all forecast by what happened before.

*Colloquy Re Motions*

Secondly, I would like to point out again that while there are minor chronologic differences between the sequence of events in the second Lemon case and the sequence of events in Mandated Services, I don't think they are really of any substance. The fact of the matter is in the Spring of 1972 the District Court rendered its decision. At that point in time the spring semester was half gone. By the time judgment was entered the spring semester was virtually all gone, June 1st; by that time these schools had, of necessity, had to budget, commit themselves and had expended a very large part of the money. I think in justice and equity the reasoning of the Supreme Court in the second Lemon case was right. I think the reasoning of the legislature in providing Enabling legislation, as contained in Section 996, is right, fair and just and I think the motion for summary judgment ought to be granted.

Thank you very much.

MR. CONNOLLY: I have nothing further, Your Honor.

THE COURT: Gentlemen, as I understand your respective positions—for the Claimant, Mr. Nolan, you base your position in large measure on Lemon II?

MR. NOLAN: I think that's right, yes.

THE COURT: And you base your position, Mr. Connolly, in large measure on Lemon I; is that a fair statement?

MR. CONNOLLY: I think that's correct, Your Honor. I think the basic distinction that we have to make is to go back to why the Court declared the statute in Lemon unconstitutional and why the Court declared the New York State—declared it unconstitutional. I draw that distinction. They put the States in this situation—damned if

*Colloquy Re Motions*

you do and damned if you don't situation and the Pennsylvania case, they said if you supervise you are involved in excessive entanglement. In the New York case they said if you don't supervise we don't know if the money is going for religious or secular purposes and that's improper also, they said.

MR. NOLAN: May I say that in *Lemon II* the Court specifically said—I am quoting from the decision—“. . . State officials and those with whom they deal are entitled to rely on a presumptively valid State statute, enacted in good faith and by no means plainly unlawful.”

I think the same thing is true here in *Mandated*. The fact that the Supreme Court's criticism of the *Mandated Services Act* dealt with the lack of intensive State auditing, I don't think there is a difference of principle. I think what we are talking about here is not a matter involving whether the *Mandated Services Act* can continue on in the future and whether there will be any long range church-State problem. We are simply talking about the innate fairness of providing to the non-public schools, which are very, very sorely pressed, as I am sure Your Honor is aware, the money that they paid out in reliance on the presumptive legality of what the New York Legislature has done and in the absence of any ruling by any court that it is unconstitutional and in the atmosphere of a situation where the only final judgment in this church-State area comes from the Supreme Court. My experience has always been it is almost a new ball game every time you get up in the Supreme Court.

THE COURT: Mr. Nolan, you seem to presume the constitutionality of Chapter 996.

*Colloquy Re Motions*

MR. NOLAN: I am talking about—principally about the constitutionality, the presumptive constitutionality of the *Mandated Services Act*. I have not addressed myself to the—

THE COURT: In your brief and in your oral argument today you rather seem to assume the constitutionality of Chapter 996.

MR. NOLAN: I think the State—

THE COURT: And I would request from both of you gentlemen that you argue that matter with each other and with the Court at this time.

MR. NOLAN: All right. Your Honor, the State has made an argument that Chapter 996 is invalid under New York Law, the New York Constitution, as I understand it, because there is—I am phrasing this in a very rough manner—there is no consideration for the granting of such funds. This does not come, the State contends, within the types of statutes in which the State has allowed the Court of Claims to grant money judgment, such as tort claims and so forth. I think that from our standpoint what the State recognized here was that the private non-public schools have in the past been conferring a benefit upon the State in terms of the fact that the State, in order to effectuate compliance with the Education Law, which requires education in certain types of subjects, requires the keeping of certain records in both non-public and public schools, ultimately requires that any education that is given in a non-public school be substantially equivalent in secular subjects to the education that is given in the public schools, so that the net results of a student's eight years in elementary school will be a diploma that is recognized as a

*Colloquy Re Motions*

diploma of the State of New York, whether he or she attends a non-public or a public school. The idea I think is to make sure that the non-public schools maintain quality education in the secular area. Now, when the State mandates certain requirements, such as keeping of attendance records to make sure that the children are going to school; the keeping of health records; the providing of examinations to make sure that the children's proficiency in educational subjects is tested on a regular basis; when they do that I think the State felt, in the original Mandated Services Act, that it was only fair to provide some State responsibility for this. Now, when that statute was declared unconstitutional the State was presented with a situation where relying upon the legislature's representations, if you will, the schools had gone ahead and expended money that it was only fair and just and, in accordance with a decent recognition of the past contribution of these schools, that Chapter 996 be adopted. I think 996, I really do not believe—and I want to check out the cases that have been cited out by the Attorney General—but in reading the quotes here I don't see anything there that says that this is a violation of the New York State constitution. I think so far as the Federal constitution is concerned that this is covered by Lemon II and that, again, the case really comes down to a determination of the applicability of Lemon II.

I would like, as I said before, to file a reply brief, which would meet the contentions made by the Attorney General in point one of his brief in the claim of unconstitutionality of Chapter 996 under the New York Statute, but it seems to me that this is something that is within the legisla-

*Colloquy Re Motions*

ture's broad purview of power to meet a situation, a pressing situation and to handle that in a way deemed to be in the public interest. The only question I would see here would be whether in so doing the Statute violated the First Amendment and I think that is answered by the Supreme Court of the United States in Lemon II.

THE COURT: Mr. Connolly?

MR. CONNOLLY: Basically, Your Honor, in this Enabling Act, moral obligation situation, there are two categories of cases in which valid Enabling Acts can be enacted. Those in which there has been an unjust enrichment of the State and those in which the Claimant was injured by some act of the State. Frankly, in this situation if there was or were not reliance on the part of the Claimant, the non-payment was not by an act of the State. It was by an act of the United States Supreme Court. It is not something where we willfully reneged. It was a situation where the State was told you cannot pay and in this situation one of the leading cases in the area is Williamsburg Savings Bank against State. The case is cited in my brief at 243 N.Y. 231, 241. The Court of Appeals said: "The decision by the Legislature that certain facts create a moral obligation, even if those facts exist, is not conclusive. The courts will still be called upon to decide whether its judgment was correct. And lastly it is incumbent upon the Legislature to avoid violation of the constitutional prohibition of audit or allowance by it of a private claim, and the final duty of awarding or adjudging payment must be performed by some appropriate body after consideration of the facts and law with full power to reject as well as to award."

*Colloquy Re Motions*

I submit that what the legislature has done in this instance is to audit a private claim. The Mandated Services Act, the State was told you cannot pay because you do not know if the money is being spent for secular or religious purposes and by allowing the claims to be filed in exactly the same amounts that would have been paid under the Mandated Services Act, the legislature has, in effect, audited these claims and held that they are to be paid by this court. I think all the cases, in effect, hold that there are some—some scintilla of a legal claim against the State, which for various reasons cannot be perfected; either there is not a forum available or the State has not waived its liability in a certain area and those are the items or the areas in which moral obligation acts have been held to be proper and that is not what we have in this situation. There is underlying this no legal claim; strictly an equitable type argument; equitable statute. And going back to the decision in *Lemon II*, the Supreme Court clearly held that it was considering an equitable decree from the trial court and its jurisdiction on review was rather limited and I just remind the Court in that situation that this Court is a Court of limited jurisdiction with very limited equitable powers and refer the Court to the case of *Psaty against Duryea* 306 N.Y., Page 413; *Benz against the Thruway Authority* 9 N.Y. 2d Page 486; *Easley against the Thruway Authority* 1 N.Y. 2d Page 374. Those cases have all held that this Court is a Court of very limited jurisdiction. It has equitable limited—limited equitable powers only in very narrow situations and that it is very possible that situations where someone has an equitable claim against the State, they are ab-

*Colloquy Re Motions*

solutely deprived of a remedy because there is no forum open to them to hear that situation.

Thank you, Your Honor.

THE COURT: Inherent in the motion for summary judgment—and before me this morning are motions for summary judgment, one brought by the Claimant and one brought by the State—is the assumption or the position that there is no triable issue of fact. Do I understand, Mr. Nolan, that that is your position?

MR. NOLAN: I believe so.

THE COURT: That there is no triable issue of fact?

MR. NOLAN: I believe so. I believe there is a claim, of course, and an affidavit by Father O'Brien, who was head of Cathedral Academy. I don't think there is any triable issue of fact and the State has raised none.

THE COURT: And do I understand, Mr. Connolly, that you take that position, having moved for summary judgment, that there is no triable issue of fact?

MR. CONNOLLY: Yes, Your Honor. I think the motion of this type in this case is appropriate.

THE COURT: In other words, you concede that there was reliance on the part of the Claimant in this matter?

MR. CONNOLLY: I think that would get into the damage question, Your Honor, rather than the question of whether the statute is proper. I think this Court could grant summary judgment to either party and if it were granted to Claimant, I think we would probably have a trial on the damage issue on how much and I think at that time it would be proper to take evidence as to whether or not there was reliance and very possibly at that time it would be necessary to introduce evidence to show how the money

*Colloquy Re Motions*

was spent, so that to prove it was not spent for religious purposes. I think the reliance gets into the question of damages rather than the question of whether the statute is proper on its face.

THE COURT: Rather than the applicability of Chapter 996 to the facts of this case, other than damages?

MR. CONNOLLY: I still think that goes to the damages, Your Honor, rather than—

THE COURT: Well, you moved for summary judgment asking dismissal of the claim.

MR. CONNOLLY: Yes.

THE COURT: Inherent in that motion is the assumption of a position by you—I think we can all agree as practicing attorneys to this, that there—the position that there is no triable issue of fact for the Court to determine. Is that a fair statement of the law, procedure motion for summary judgment?

MR. CONNOLLY: Yes, I would agree to that, Your Honor.

THE COURT: So my question to you is: Do you concede that there was reliance on the part of the Claimant to Chapter 996?

MR. CONNOLLY: In reading the claim, Judge, there is no allegation that there was reliance.

THE COURT: Well, the Claimant is arguing reliance, as I understand it.

Is that so, Mr. Nolan?

MR. NOLAN: Yes, Your Honor, and Paragraphs 5 and 6 of Father O'Brien's affidavit is in support of the motion for summary judgment. I don't have the claim before me at the moment, but in the affidavit it says, according to Paragraph 5: "Claimant duly applied and was reimbursed

*Colloquy Re Motions*

by the State for the costs it incurred in providing the above services mandated by law for the school year 1970-'71.

"Claimant budgeted for, and relied on eventual receipt of, similar reimbursement pursuant to Chapter 138 for the school year 1971-'72."

So I think we certainly do feel that the school relied on it and it seems to me that there is no real issue, I wouldn't think, about that. So far as any question of damages—

THE COURT: That is what I am endeavoring to clarify, whether we do have an issue—

MR. NOLAN: I don't think so.

THE COURT: —on the matter of reliance?

MR. NOLAN: The State has not controverted in any way the factual affidavit of Father O'Brien as to the amount. The State Education Department proffered and paid the first portion, which was exactly the same amount. In other words, the first portion of the '71-'72 amount was paid prior to the District Court's decision and that was in the exact amount of \$7,347.28 and this is simply the other half. As to the reliance, we certainly claim it. It has not been controverted and I do not see any issue of fact here. It is a legal issue.

THE COURT: I understand your position now, Mr. Nolan, and in the claim it is stated that the claim was brought on Chapter 996.

MR. NOLAN: That's right.

THE COURT: The affidavit by Father O'Brien does allege reliance.

MR. NOLAN: That's right, sir.

*Colloquy Re Motions*

THE COURT: What I am endeavoring to ascertain is whether or not we have an issue of fact to be determined with regard to reliance and, as I understand your position, Mr. Connolly, it is that a matter of reliance, not a matter of reliance, it is a matter to be concerned about insofar as the damages are concerned. Is that the position you are taking?

MR. CONNOLLY: Yes, it is, Judge.

THE COURT: Only as to damages?

MR. CONNOLLY: I am sorry to hedge on it, Judge.

THE COURT: That is all right, Mr. Connolly; take your time, but, once again, the Court has two motions for summary judgment before it and I am just trying to clarify as to whether we do have an issue of fact here, which should be tried. Again, inherent, as we all know, in a motion for summary judgment is the assumption or position that there is no triable issue of fact. You have made such a motion.

MR. CONNOLLY: Yes.

THE COURT: As has the Claimant, who has stated that there is no triable issue of fact and a certain reliance. You appear not to want to concede reliance totally for all purposes. Can you clarify for the Court a little bit better just what your position is?

MR. CONNOLLY: Basically, that the Enabling Act itself is unconstitutional without getting into the reliance issue. It is the statute itself that we are addressing our motion for summary judgment. We have not raised the issue of reliance and it does not come or arise in our papers or anything that we submitted to the Court.

*Colloquy Re Motions*

THE COURT: It does if you are right in your position that 996 is unconstitutional; only if that be the determination.

MR. CONNOLLY: Well, that's the basis of my motion, Judge. I don't want to, and I apologize to the Court, I don't want to stipulate that point away at this time. When I say "that point," I don't want to stipulate on the reliance issue at this time, Judge. I would be stipulating to a set of facts which, frankly, I don't have the authority to stipulate to, one of my reservations, but I think on our position on the cross-motion for a summary judgment dismissing the claim, our position is based on the face of the statute and I don't think reliance becomes a question.

THE COURT: Do you have anything further, Mr. Nolan?

MR. NOLAN: No, Your Honor, except it seems to me that if by making a cross-motion for summary judgment the State is saying that there is no triable issue of fact, just as when we make a motion on behalf of Catholic Cathedral for summary judgment, we are telling Your Honor there is no triable issue of fact and it seems to me it is perfectly apparent from the circumstances of this whether or not the statute is—996 is or is not constitutional is perfectly apparent that these schools relied and the legislature so found.

THE COURT: Anything further, Mr. Connolly?

MR. CONNOLLY: I am bothered by the question Your Honor has raised on reliance. If that is going to become an issue, I will withdraw my motion for summary judgment and, frankly, take the position that the Claimants in all fourteen hundred claims that have been filed are required to put in testimony and evidence to show reliance. The fact

*Colloquy Re Motions*

that the legislature said there was reliance does not foreclose this Court from looking at that issue and that's why I don't want to stipulate to it and, frankly, if Claimants are taking that position, they are supporting my position that the Enabling Act is unconstitutional and I just can't concede that point and if it does become an issue then I will withdraw my cross-motion and ask that the Claimant's motion be denied. We have triable issues of fact, if that is the problem.

MR. NOLAN: It seems to me that we have an affidavit in here by Father O'Brien saying that the school relied on it. It seems to me that the State—the State has had this affidavit since November 20th, or thereabouts. If they had any question about it they could have controverted it. They haven't. In fact, the question of reliance I thought had been resolved and everybody was approaching this thing from the standpoint of a legal issue and I think that is the way to do it. I think not only from Father O'Brien's affidavit, but just inherent in the entire sequence of events here, it seems to me it would be almost incredible that the schools did not rely in budgeting on these matters. Now, it seems to me it would be awfully wasteful because there are other claims that are similar to this, it would be awfully wasteful to require proof of this. It seems to me what we have here is a situation involving the question of whether Chapter 996 is constitutional under the New York Constitution; is it constitutional under the Federal Constitution in the light of Lemon II and any other pertinent decisions and the amount in controversy, I don't think can seriously be disputed by the State because it is the exact amount the State Education Department said was correct in the Spring

*Colloquy Re Motions*

of 1971, but what I think we all would like here, on this side of the table, is to move this matter along so we know where we stand.

MR. CONNOLLY: I have the same feeling, Judge, that, frankly, the basis of my cross-motion was, I think it is a threshold question that this Court has to decide and that is whether or not the Enabling Act violates the New York Constitution and the United States Constitution and I really don't think that reliance becomes a question when addressing ourselves to that threshold determination and that is why the issue never came up, nor discussed. I had many discussions with Mr. Sanderson and Mr. Aquilino and we approached this from the standpoint that this would be a—that there are strictly legal issues and I still feel that way. I think that's a threshold determination that has to be made before we can move on to the next question.

MR. NOLAN: Well, it seems to me that we have filed a motion for summary judgment in which we have made an allegation of reliance; that allegation has not been controverted by any evidence and the State has had an opportunity to obtain such evidence and to me it just seems virtually incomprehensible that the State would take the position that there was not reliance on the situation.

Now, whether Chapter 996 is constitutional or not constitutional is one thing, but it seems to me that we are moving for summary judgment on a claim in which, as a factual matter, we have alleged reliance on the legislature's action. There has been no controverted—no contravention of that allegation. It seems to me that there is no realistic issue here of a factual nature. I think this is really a question of: Is the Chapter constitutional? If so, it seems

*Decision Reserved*

to me that the results flow from that. If it is not constitutional there are results that flow from that.

Thank you.

MR. CONNOLLY: I have nothing further. //

THE COURT: So that the record may be clear, I think I should inquire of you, Mr. Connolly, in view of your statement of a few moments ago that if the Claimant asserts the position, that you might withdraw your motion for summary judgment on behalf of the State, are you doing that or are you pursuing your motion? I don't want to put you in the position of making the decision instantly. Do you wish to take the position that you will pursue the motion and in that case withdraw it at some other time before the Court makes a decision?

MR. CONNOLLY: I would take the position—at that point I would like to pursue my cross-motion upon the ground that the claim itself has been filed pursuant to an unconstitutional statute. Once the Court decides the question of whether or not the Enabling Act is constitutional, I think, as Mr. Nolan said, obvious results flow from there.

THE COURT: Is there anything else to come before the Court at this time, Gentlemen?

MR. NOLAN: No.

MR. CONNOLLY: No.

THE COURT: All right. Decision is reserved. Court is adjourned.

*Certification*

I, Gilbert Schlamowitz Official Court Reporter of the Court of Claims, do hereby certify that I attended at the time and place above mentioned and took a stenographic record of the proceedings and testimony in the above entitled claim, and that the foregoing is a true and correct copy of the same and the whole thereof, according to the best of my ability.

/s/ GILBERT SCHLAMOWITZ, C.S.R.

Dated June 10, 1974

## OPINION OF THE NEW YORK COURT OF CLAIMS.

COURT OF CLAIMS  
STATE OF NEW YORK

Claim No. 56557

Motion No. M-15976

CATHEDRAL ACADEMY,

Claimant,

—against—

THE STATE OF NEW YORK,

Defendant.

## Before:

HONORABLE WILLIAM L. FORD,  
*Judge of the Court of Claims.*

## Appearances:

## For the Claimant:

DAVIS, POLK &amp; WARDWELL, Esqs.,

By: RICHARD E. NOLAN, Esq.,

and

THOMAS J. AQUILINO, JR., Esq.,  
*of Counsel.*

## For the State:

HONORABLE LOUIS J. LEFKOWITZ,  
*Attorney General.*By: KENNETH J. CONNOLLY,  
*Assistant Attorney General.*

## OPINION OF THE NEW YORK COURT OF CLAIMS.

By notice of motion claimant seeks summary judgment on its claim, filed pursuant to Chapter 996 of the Laws of New York 1972<sup>\*</sup>, in the amount of \$7,347.29 as the balance alleged to be due and payable as reimbursement for funds expended by claimant as set forth in said Chapter and which had been provided by Chapter 138 of the Laws of New York 1970<sup>\*\*</sup>, for certain school related services, described in both Chapters,<sup>1</sup> rendered in the second half of the 1971-1972 school year.

The defendant did not file an answering affidavit to claimant's motion. In its memorandum of law, filed prior to oral argument of the motion, and during the argument, it opposed claimant's motion and cross-moved for summary judgment dismissing the claim on the grounds that Chapter 996 is unconstitutional and that the decision of the United States Supreme Court in *Levitt v. Committee for Public Education and Religious Liberty*, 413 US 472 [June 25, 1973] requires dismissal. Subsequent to the argument, defendant requested, by letter to the Court, that its cross-motion be treated as a motion to dismiss rather than as a motion for summary judgment. The claimant, by letter to

<sup>\*</sup> Copy of Ch. 996 of the Laws of New York 1972 attached as Appendix A.

<sup>\*\*</sup> Copy of Ch. 138 of the Laws of New York 1970 attached as Appendix B.

<sup>1</sup> The school related services described in Chapters 138 and 996 included examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the State of various other reports as provided for or required by law or regulation.

OPINION OF THE NEW YORK COURT OF CLAIMS.

the Court, stated that it had no objection to the request and the Court, therefore, considers the defendant's motion as one for dismissal of the claim.

Both parties came to court originally with motions for summary judgment, and there has been no evidentiary hearing requested or held. The only sworn statements are contained in the affidavit attached to claimant's notice of motion. The Court, therefore, finds that there is no factual issue herein.

The claimant contends, the defendant does not dispute, and the Court finds that claimant was one of the schools included within the provisions of Chapter 138 and in accordance therewith made application for reimbursement for services rendered in the school year 1970-1971 and was reimbursed by the State for that school year in two equal payments; that claimant budgeted for, relied upon and filed a similar application on or about November 5, 1971 for reimbursement for the school year 1971-1972 and the State reimbursed the claimant in January of 1972 for the first semester; and that the claimant rendered the required services for the remaining semester of the 1971-1972 school year and has not been reimbursed therefor.

The Court further finds as undisputed that on September 6, 1972 the claimant timely filed its claim with this Court pursuant to Chapter 996 which was approved and became effective on June 8, 1972; that this claim has not been assigned or submitted to any other court or tribunal for audit or determination and that Chapter 996 conferred jurisdiction upon this Court to hear, audit and determine the claim or claims of nonprofit schools, other than public schools, against the State for reimbursement of the funds expended

OPINION OF THE NEW YORK COURT OF CLAIMS.

by them in rendering certain school related services under Chapter 138, commonly known as the Mandated Services Act, which Act became law on April 18, 1970, effective on September 1, 1970, though its applicability related back to July 1, 1970, and which Act was held unconstitutional by a three-judge United States District Court, Southern District of New York in *Committee for Public Education and Relig. Lib. v. Levitt*, 342 F. Supp. 439, decided April 27, 1972, one judge dissenting, and was affirmed with opinion by the United States Supreme Court in *Levitt v. Committee for Public Education and Religious Liberty*, 413 US 472 [June 25, 1973].

The claimant contends, in moving for summary judgment, that, as a matter of State law and equity, the legislature in enacting Chapter 996 on June 8, 1972, has properly and legally recognized that, upon the factual situation here present, the State was morally obligated to establish a procedure by which claimant could be reimbursed and to confer jurisdiction upon this Court to hear, audit and determine the claim or claims of claimant and other nonprofit schools located in the State, other than public schools, against the State for reimbursement of the funds expended by them in rendering services for examination and inspection in connection with certain school related services as described in Chapters 138 and 996.

Claimant argues that Chapter 996 is constitutional in all respects and that the situation in which it finds itself and which morally obligates the State to reimburse it, consists substantially of the following facts: that the State, by Chapter 138, represented and promised to claimant, and others similarly situated, that they would be reimbursed

OPINION OF THE NEW YORK COURT OF CLAIMS.

for expenses incurred after July 1, 1970 in rendering the services mandated by said Chapter 138; that the State knew that claimant and said schools were relying on said representation; that said representation was an effective cause of said expenses by claimant and other schools; that appropriations, known to claimant, were made to the Education Department to enable that Department to reimburse such schools for the rendering of such services; that based on the representation of the State that reimbursement would be made for such services, such schools already in fiscal crisis, by budgetary allocations and other methods, made available the necessary personnel to perform such services; that Federal courts, by various orders, enjoined payments to such schools and as a result, reimbursement for the full period July 1, 1971 to June 30, 1972 has not been made to claimant and such schools, although all such services were duly performed; that claimant and such schools during such period did incur expenses in rendering the mandated services in reliance upon such representation of reimbursement; and that the legislature has indeed recognized a moral obligation resting upon the State to provide, as it has attempted to do, a remedy whereby such schools may recover the complete amount of expenses incurred by them prior to June 30, 1972 in reliance on the said representation. Claimant argues further that not only do the foregoing facts exist but also that the State legislature in the very language of Chapter 996 admits all of them and states, upon said facts, its own conclusions that a moral obligation to reimburse exists and that said claim or claims are founded in right and justice, or in law or equity.

Any issues of Federal law and equity, claimant contends, in effect, have been decided already in its favor in *Lemon*

OPINION OF THE NEW YORK COURT OF CLAIMS.

v. *Kurtzman*, 403 US 602 [1971, *Lemon I*] and 411 US 192 [1973, *Lemon II*]. It argues that in *Lemon II* as in *Levitt*, supra, a group of taxpayers sought to thwart the legislative will through the filing of federal suits, without pursuing or obtaining preliminary injunction, thus allowing the legislative enactments to become and remain effective and allowing the states and the nonpublic schools to rely on such enactments; that in both cases, the constitutionality of the respective statutes was determined finally only after full review by the Supreme Court; that in both cases, judgment of unconstitutionality was made at or near the end of the school year; that in both cases, the nonpublic schools and the states had relied, in good faith, on the respective statutes and the nonpublic schools had incurred substantial financial obligations pursuant thereto during the time the federal actions were pending. Thus, claimant argues, to the extent that federal constitutional issues relate to its motion, *Lemon II* is controlling and supports its claim.

The defendant contends that Chapter 996 is unconstitutional in that, at the outset, the State legislature lacked the constitutional power to enact Chapter 996 authorizing this claim.

The defendant further contends that some act on the part of the State creating a moral obligation to reimburse is lacking in the instant claim and is necessary as a matter of law in order to overcome the constitutional prohibitions of (a) auditing of private claims by the legislature (Article III, §19, State Constitution) or (b) making gifts of State money (Article VII, §8, State Constitution).

In support of its contention the defendant argues that a moral obligation, such as to validate enabling acts, is

OPINION OF THE NEW YORK COURT OF CLAIMS.

created only in those cases in which there has been an unjust enrichment of the State by virtue of benefits conferred upon it by private persons and, secondly, in those cases in which the claimant is injured by some act of the State or its officers and agents.

The defendant's position is that, in the instant case, there has been no benefit to or unjust enrichment of the State, nor has there been any injury or damage inflicted by anyone in the State's service. In fact, says defendant, the enabling act itself clearly demonstrates in Section 2(a) that prior to July 1, 1970 claimant was performing, at its own expense, the same services for which it now seeks reimbursement and that, therefore, any claim that these services were performed on representations of the State clearly is without merit and, in any case, it had no right to so rely.

Additionally, the defendant argues that since Chapter 138 provides no procedure to insure that State funds are not used for religious purposes, this Court cannot determine whether the amount claimed is subject to constitutional objections and, therefore, in purporting to allow claimant to recover the sum of \$7,347.29 the legislature is auditing a private claim in contravention of Article III, §19 of the State Constitution.

The defendant urges another objection to the enabling act, namely, that it is an attempt by the legislature to reverse the decisions of the District Court and the United States Supreme Court in *Levitt*, supra, and that this attempt is a clear violation of the constitutional doctrine of separation of powers, being an invasion of the powers of the judiciary by the legislature.

OPINION OF THE NEW YORK COURT OF CLAIMS.

Lastly, the defendant contends that the decision of the Supreme Court in *Levitt v. Committee for Public Education and Religious Liberty*, 413 US 472, requires dismissal of this claim and defendant reinforces this contention by arguing that the decisions of the Supreme Court in *Lemon v. Kurtzman*, 403 US 602 [June 28, 1971, *Lemon I*] and 411 US 192 [April 2, 1973, *Lemon II*] relied on by claimant, are distinguishable from *Levitt*, supra, and, in fact, actually support the defendant's position.

In deciding these motions, attention should first be directed, in the Court's view, to the critical question of whether or not, assuming arguendo that Chapter 996 was constitutionally enacted, the implementation thereof by this Court would be constitutionally permissible. If the answer to this question be in the negative, there is no purpose in the Court's determining whether the facts, upon which this claim authorized by Chapter 996 arose and which the Court has found are as the legislature has determined them to be, constitute a predicate for a moral obligation on the State's part which is essential for the creation of a valid claim.

The Court is of the opinion that it must answer its question in the negative and it therefore holds that the implementation of Chapter 996, in the form of an award of a payment to the claimant, would be constitutionally impermissible as violative of the Establishment Clause of the First Amendment to the Constitution of the United States and bases its decision upon the holdings made in the majority opinion of Mr. Chief Justice Burger in *Levitt*, supra.

The significant holding therein and discussion is to be found on pages 479, 480:

OPINION OF THE NEW YORK COURT OF CLAIMS.

"As noted previously, Chapter 138 provides for a direct money grant to sectarian schools for performance of various 'services.' Among those services is the maintenance of a regular program of traditional internal testing designed to measure pupil achievement. Yet, despite the obviously integral role of such testing in the total teaching process, no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction.

"We cannot ignore the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church. We do not 'assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment.' *Lemon v. Kurtzman*, 403 US, at 618. But the potential for conflict 'inheres in the situation,' and because of that the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination. See *id.*, at 617, 619. Since the State has failed to do so here, we are left with no choice under *Nyquist* but to hold that Chapter 138 constitutes an impermissible aid to religion; this is so because the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities."

Mr. Chief Justice Burger said more on page 482:

"We hold that the lump sum payments under Chapter 138 violate the Establishment Clause. Since Chapter 138 provides only for a single per-pupil allotment for a variety

OPINION OF THE NEW YORK COURT OF CLAIMS.

of specified services, some secular and some potentially religious, neither this Court nor the District Court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reimbursable secular services. That is a legislative, not a judicial function."

Chapter 996 states, among other things, that the base of this claim and others is, in effect, predicated on the non-profit, nonpublic schools' performance of certain services beneficial to the State and such schools' reliance for reimbursement therefor under Chapter 138. The Supreme Court, in *Levitt*, held that Chapter 138 violated the Establishment Clause. To hold with the claimant would require this Court to implement Chapter 996. This cannot be done because it would have the effect of resurrecting Chapter 138 which the Supreme Court declared unconstitutional.

Despite the holding in *Levitt*, claimant urges that *Lemon II* stands for the proposition that, even though a state statute may have been struck down under the Establishment Clause, nevertheless, when a claimant relies thereon, prior to the finding of unconstitutionality, in performing certain services with the expectation of reimbursement, which is not forthcoming, then, in right, justice, law and equity claimant should be reimbursed. As applied to the facts of the instant claim we disagree because in *Lemon II* the Supreme Court, after remand, found that any payments there allowed "will not be applied for any sectarian purposes" (see pp. 202, 203), whereas in *Levitt* the Court found that "the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities" (see p. 480).

# OPINION OF THE NEW YORK COURT OF CLAIMS.

In *Lemon II*, in affirming the judgment of the three-judge District Court of the Eastern District of Pennsylvania entered after remand, Mr. Chief Justice Burger, in an opinion joined in by three other justices, made a specific finding that the State funds there involved would not be applied for any sectarian purposes, stating on pages 202, 203:

"Yet even assuming a cognizable constitutional interest in barring any state payments, under the District Court holding, that interest is implicated only once under special circumstances that will not recur. There is no present risk of significant intrusive administrative entanglement, since only a final post-audit remains and detailed state surveillance of the schools is a thing of the past. At the same time, that very process of oversight—now an accomplished fact—assures that state funds will not be applied for any sectarian purposes.<sup>3</sup> Finally, as will appear, even this single

<sup>3</sup> See *Lemon I*, supra:

"If the government closed its eyes to the manner in which these grants are actually used it would be allowing public funds to promote sectarian education. If it did not close its eyes but undertook the surveillance needed, it would, I fear, intermeddle in parochial affairs in a way that would breed only rancor and dissension." 403 US, at 640, 29 L Ed 2d 745 (concurring opinion of Douglas, J.)

"The Court thus creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught . . . and enforces it, it is then entangled in the 'no entanglement' aspect of the Court's Establishment Clause jurisprudence." *Id.*, at 668, 29 L Ed 2d 783 (dissenting opinion of White, J.)

Here, the "insoluble paradox" is avoided because the entangling supervision prerequisite to state aid has already been accomplished and need not enter into our present evaluation of the constitutional interests at stake in the proposed payment.

# OPINION OF THE NEW YORK COURT OF CLAIMS.

proposed payment for services long since passing state scrutiny reflects no more than the schools' reliance on promised payment for expenses incurred by them prior to June 28, 1971."

The reimbursement in *Lemon II*, affirmed by the Supreme Court, was found allowable because of the very reason the statute was struck down, i.e., the excessive entanglement by the State of Pennsylvania. Such process of oversight by the State, in the form of auditing, assured that State funds would not be applied for any sectarian purposes. Hence, the Supreme Court reasoned that, even assuming a cognizable constitutional interest in barring any state payments under the Pennsylvania statute, any payments to the schools would not and could not be applied by them in aid of sectarian purposes. That essential assurance is lacking in Chapters 138 and 996.

Neither can we implement, try as we may, Chapter 996 to the extent of allowing, after a trial and the taking of proof, reimbursement to claimant and others similarly situated for monies expended for services rendered which would seem to fall within the ambit of constitutional permissibility, i.e., maintenance of records of pupil enrollment and reporting thereon, maintenance of public health records, recording of personnel qualifications and characteristics and services of a like nature which are purely secular activities. This is so because in *Levitt*, supra, the Supreme Court, as we previously noted, stated (page 482): "Since Chapter 138 provides only for a single per-pupil allotment \* \* \*, neither this Court nor the District Court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reim-

*OPINION OF THE NEW YORK COURT OF CLAIMS.*

bursable secular services. That is a legislative, not a judicial function."

Nor does Chapter 996 impose enforceable standards or guidelines which would enable this Court to separate and apportion the single per-pupil allotment among the various allowed purposes. *Wolman v. Essex*, 342 F. Supp. 399 [1972], aff'd 409 US 808, reh. den., — US —, 37 L Ed 2d 1045; *McArthur v. State of New York*, 43 AD 2d 652 [1973]. Such standards or guidelines are to be established by the legislature, not the courts.

Sympathize as we do with this claimant, and the many others similarly situated, and recognize as we must their great and ongoing contributions to the education of over 800,000 young people in this State, and aware as we are of the serious financial problems directly facing the parochial schools, and indirectly, the public, we are, nevertheless, at the same time, constrained because of the Supreme Court decisions in *Levitt* and *Lemon II*, to deny reimbursement as being unconstitutional.

In *Committee for Public Education and Relig. Lib. v. Levitt*, 342 F. Supp. 439 at page 445, we find: "But the First Amendment, which has for two centuries assured the individual's right to worship as he chooses, protected the church from the impositions of the state, and immunized the national community against the ills of religious-political divisiveness, must be our guiding star."

Accordingly, claimant's motion for summary judgment is denied and the defendant's motion for dismissal of this claim is granted.

This decision is not intended to affect any claim or claims which have been filed with the Court pursuant to

*OPINION OF THE NEW YORK COURT OF CLAIMS.*

Chapter 996 by any nonchurch, nonreligious or nonsectarian nonpublic schools.

Defendant shall submit an order, in accordance with this decision, to be settled on seven days' notice.

Dated: April 2, 1974

Albany, New York

/s/ WILLIAM L. FORD  
Judge of the Court of Claims

Appendix A — Ch. 996 of the Laws of New York 1972  
attached to Opinion of the Court of Claims.

Claims Against State—Nonprofit Schools

CHAPTER 996

An Act to confer jurisdiction upon the court of claims to hear, audit and determine the claim or claims of nonprofit schools, other than public schools for expenses incurred in rendering certain mandated services.

Approved and effective June 8, 1972.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Jurisdiction is hereby conferred upon the court of claims to hear, audit and determine the claim or claims of nonprofit schools in the state, other than public schools, against the state for reimbursement of the funds expended by them in rendering services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports required by law or regulation. The base of said claim or claims is that the State of New York represented to said schools that they would be reimbursed for such expenses incurred after July first, nineteen hundred seventy; that the said State knew that said schools were relying on said representation; that said representation was an effective cause of said expenses by said schools; and that without any fault on the part of said schools complete reimbursement has not been paid to them, though due and owing. As such, said claim or claims are founded in right and justice, or in law or equity.

Section 2. In hearing, auditing and determining such claim or claims, the court of claims is hereby authorized to consider, *inter alia*:

3134 Changes or additions in text are indicated by underline

Appendix A — Ch. 996 of the Laws of New York 1972  
attached to Opinion of the Court of Claims.

(a) That prior to July first, nineteen hundred seventy, said nonprofit schools, rendered services for examination and inspection in connection with administering, grading and the compiling and reporting of the results of tests and examination, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualification and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation;

(b) That by a chapter of the laws of nineteen hundred seventy, it was determined and declared as a matter of legislative finding:

"That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities. That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.

And that nonpublic schools of the state are responsible for the education of more than eight hundred fifty thousand pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools which these children attend in fulfillment of the above state purposes are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonable assisting such services."

(c) That in furtherance of said policy, appropriations were made to the education department to enable the department to reimburse such schools for the rendering of such services;

*Appendix A — Ch. 996 of the Laws of New York 1972  
attached to Opinion of the Court of Claims.*

(d) Based on the representation of the State that reimbursement would be made for such services, such schools already in fiscal crisis, by budgetary allocations and other methods made available the necessary personnel to perform such services;

(e) That the federal courts, by various orders enjoined payments to such schools. As a result reimbursement for the full period July first, nineteen hundred seventy-one to June thirtieth, nineteen hundred seventy-two, has not been made to such schools, although all such services were or will be duly performed;

(f) That such schools during such period did incur expenses in providing the mandated services in reliance upon said representation of reimbursement;

(g) That but for this claim or claims complete reimbursement to such schools would not be made and such schools are thus without legal right to recover for said expenses;

(h) That the legislature recognizes a moral obligation to provide a remedy whereby such schools may recover the complete amount of expenses incurred by them prior to June thirtieth, nineteen hundred seventy-two in reliance on the said representation.

Section 3. If the court finds that such claim or claims or any of them were founded in right and justice or in law and equity against the state of New York, and are in right and justice presently payable thereby, the state shall be deemed to have been liable therefor and such claim or claims shall constitute legal and valid claims against the state, and the court may award and render judgments for the claimants as shall be just and equitable, notwithstanding the lapse of time since any such claim or claims or any parts thereof accrued, or the failure to do any act in relation to the presentation of such claims or any of them within the time prescribed by law, but no award shall be made or judgment rendered hereunder against the state unless such claim shall be filed with the court of claims within ninety days

*Appendix A — Ch. 996 of the Laws of New York 1972  
attached to Opinion of the Court of Claims.*

from the passage of this act, nor if such claim, as between citizens of the state, would be barred by lapse of time.

Section 4. This act shall take effect immediately.

deletions by ~~strikeouts~~

3135

Appendix B — Ch. 138 of the Laws of New York 1970  
attached to Opinion of the Court of Claims.

CHAPTER 138

AN ACT to provide for the apportionment of state monies to certain nonpublic schools in connection with inspection and examination, and making an appropriation therefor

Became a law April 18, 1870, with the approval of the Governor. Passed on message of necessity pursuant to article III, section 14 of the Constitution by a majority vote, three-fifths being present

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. It is hereby determined and declared as a matter of legislative finding:

That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.

Nonpublic schools of the state are responsible for the education of more than 850,000 pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools which these children attend in fulfillment of the above state purposes are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonably assisting such services.

Explanation — Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

Appendix B — Ch. 138 of the Laws of New York 1970  
attached to Opinion of the Court of Claims.

Section 2. There shall be apportioned annually by the commissioner to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy, the amounts set forth below, out of funds appropriated therefor, for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation. The amount to be apportioned to each qualifying school in each school year shall be the sum of the following:

a. The product of fifteen cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades one through six; and

b. The product of twenty-five cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades seven through twelve.

The apportionment shall be reduced by one one-hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base year, except that the commissioner may disregard such reduction up to five days if he finds that the school was not in session for one hundred eighty days because of extraordinarily adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, or any day, not to exceed three days, when such school was not in session because of a conference of teachers called by the principal of the school.

*Appendix B — Ch. 138 of the Laws of New York 1970  
attached to Opinion of the Court of Claims.*

Section 3. In this act:

1. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils who are resident of the state during the base year divided by the number of days the school was in session during the base year; except that for the school year commencing July first, nineteen hundred seventy, the term "average daily attendance" means the total number of attendance days of such enrolled pupils during either September, October or November of such school year, as selected by the school, divided by the number of days such school was in session during such month.

2. "Base year" shall mean the school year immediately preceding the current year, except that for the school year commencing July first, nineteen hundred seventy, the base year shall be such school year, and any reduction in aid required for such base year by virtue of the failure to maintain the required total session shall be made in the apportionment in the subsequent school year.

3. "Commissioner" shall mean the state commissioner of education.

4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this chapter.

5. "Qualifying school" shall mean a non-profit school in the state, other than a public school, which provides instruction in accordance with section thirty-two hundred four of the education law.

Section 4. Each school which seeks an apportionment pursuant to this act shall submit to the commissioner an application therefor together with such additional reports and documents as the commissioner may require, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this act.

Section 5. The amount to be apportioned to a school in any current year shall be paid in two installments, the first to consist of one-half of the estimated total apportionment and to be

*Appendix B — Ch. 138 of the Laws of New York 1970  
attached to Opinion of the Court of Claims.*

paid between January fifteenth and March fifteenth of such year, and the second to consist of the balance and to be paid between April fifteenth and June fifteenth of such year; provided that the commissioner may provide for later payments for the purpose of adjusting and correcting apportionments.

Section 6. Apportionments made for the benefit of any school which is not a corporate entity shall be paid, on behalf of such school, to such corporate body as may be designated for such purpose pursuant to regulations promulgated by the commissioner.

Section 7. The sum of twenty-eight million dollars (\$28,000,000) or so much thereof as may be necessary, is hereby appropriated to the education department out of any monies in the state treasury in the general fund to the credit of the local assistance fund not otherwise appropriated, for the purposes of this act. Such sum shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner of education in the manner provided by law.

Section 8. Nothing contained in this act shall be construed to authorize the making of any payment under this act for religious worship or instruction.

Section 9. Any school receiving aid pursuant to this act shall be subject to the provisions of section three hundred thirteen of the education law.

Section 10. This act shall take effect September first, nineteen hundred seventy.

## JUDGMENT OF THE NEW YORK COURT OF CLAIMS.

At a Regular Term for Motions of the Court of Claims of the State of New York, held at the Justice Building, Albany, New York, on the 21st day of December, 1973.

[Filed April 22, 1974]

## Present:

HONORABLE WILLIAM L. FORD,  
*Judge of the Court of Claims*

---

[SAME TITLE]

---

Claimant having moved for summary judgment and the State having cross-moved to dismiss, now

Upon the claim, filed in the office of the Clerk of the Court of Claims on September 6, 1972, the Notice of Motion for Summary Judgment, dated November 20, 1973, the affidavit of Leo P. O'Brien, sworn to November 20, 1973, and upon all the papers and proceedings heretofore had herein, and after hearing Davis, Polk & Wardwell, Esq., by Richard E. Nolan, Esq. and Thomas J. Aquilino, Jr., Esq., of counsel, attorneys for claimant in support of the motion and in opposition to the cross-motion, and Louis J. Lefkowitz, Attorney General of the State of New York, by Kenneth J. Connolly, Esq., of counsel, in opposition to the motion and in support of the cross-motion, and a decision dated April 2, 1974, having been rendered dismissing the claim, it is

## JUDGMENT OF THE NEW YORK COURT OF CLAIMS.

ORDERED, that claimant's motion for summary judgment is denied, and it is

FURTHER ORDERED, that the State's cross-motion for dismissal is granted and the claim is hereby dismissed.

Dated: April 22, 1974

WILLIAM L. FORD  
/s/ WILLIAM L. FORD  
*Judge of the Court of Claims*

NOTICE OF APPEAL TO APPELLATE DIVISION OF THE  
NEW YORK SUPREME COURT.

COURT OF CLAIMS  
STATE OF NEW YORK

Claim No. 56557

---

CATHEDRAL ACADEMY,

*Claimant,*

—against—

THE STATE OF NEW YORK.

---

SIRs:

PLEASE TAKE NOTICE that the above-named claimant, Cathedral Academy, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Third Department, from a judgment denying claimant's motion for summary judgment, granting the State of New York's motion to dismiss and dismissing the claim in the above matter entered in the office of the Clerk of the Court of Claims on the 22nd day of April, 1974, and this appeal is taken from each and every part of said judgment as well as the whole thereof.

NOTICE OF APPEAL TO APPELLATE DIVISION OF THE  
NEW YORK SUPREME COURT.

Dated: New York, New York  
May 13, 1974

Yours, etc.

DAVIS POLK & WARDWELL

By /s/ RICHARD E. NOLAN

(A Member of the Firm)

*Attorneys for Claimant*

1 Chase Manhattan Plaza

New York, New York 10005

Tel.: (212) 422-3400

To:

CLERK, COURT OF CLAIMS

Justice Building

Empire State Plaza

Albany, New York 12223

HON. LOUIS J. LEFKOWITZ

*Attorney General*

KENNETH J. CONNOLLY, Esq.

*Assistant Attorney General*

Justice Building

Empire State Plaza

Albany, New York 12223

## OPINIONS IN APPELLATE DIVISION, dated 4-24-75.

[Printed in full in Appendix to Jurisdictional Statement;  
Officially reported at 47 AD2d 390, 366 NYS 2d 900.]

---

## ORDER OF THE APPELLATE DIVISION APPEALED FROM.

At a Term of the Appellate Division  
of the Supreme Court of the  
State of New York, held in and  
for the Third Judicial Depart-  
ment, at the Justice Building in  
the City of Albany, New York,  
commencing on the 10th day of  
February, 1975.

## Present:

HON. J. CLARENCE HERLIHY,  
*Presiding Justice,*

HON. LOUIS M. GREENBLOTT,  
HON. MICHAEL E. SWEENEY,  
HON. T. PAUL KANE,  
HON. JOHN L. LARKIN,  
*Associate Justices.*

---

CATHEDRAL ACADEMY,

*Appellant,*

—against—

THE STATE OF NEW YORK,

*Respondent.*

Claim No. 56557

---

Cathedral Academy having appealed from an order (de-  
nominated a judgment) of the Court of Claims, entered

**ORDER OF THE APPELLATE DIVISION APPEALED FROM.**

on the 22nd day of April, 1974, in the office of the Clerk of that Court dismissing the claim herein, and said appeal having been presented during the above-stated term of this Court, and having been argued by Richard E. Nolan, Esq., of counsel for appellant, and by Jean M. Coon, of counsel for Louis J. Lefkowitz, Attorney General of the State of New York, counsel for respondent, and, after due deliberation, the Court having rendered a decision on the 24th day of April, 1975, [Justices Herlihy and Larkin dissenting] it is hereby

ORDERED that the order appealed from be and the same hereby is affirmed, without costs.

ENTER:

/s/ JOHN J. O'BRIEN  
Clerk

DATED AND ENTERED: May 6, 1975.

A TRUE COPY

/s/ JOHN J. O'BRIEN  
Clerk

**NOTICE OF APPEAL TO THE NEW YORK COURT OF APPEALS.**

SUPREME COURT  
STATE OF NEW YORK

APPELLATE DIVISION—THIRD DEPARTMENT

No. 24780

---

CATHEDRAL ACADEMY,

*Appellant,*

—against—

THE STATE OF NEW YORK,

*Respondent.*

---

SIRS:

PLEASE TAKE NOTICE that the above-named appellant hereby appeals to the Court of Appeals from the Order of the Appellate Division, Third Department duly entered herein on the 6th day of May, 1975, which order affirmed the judgment of the Court of Claims entered therein on the 22nd day of April, 1974, Justices Herlihy and Larkin dissenting.

NOTICE OF APPEAL TO THE NEW YORK COURT OF  
APPEALS.

Dated: New York, New York  
May 27, 1975

Yours, etc.

DAVIS POLK & WARDWELL

By RICHARD E. NOLAN

A Member thereof

*Attorneys for Appellant*

1 Chase Manhattan Plaza

New York, New York 10005

Tel.: (212) 422-3400

To:

HON. LOUIS J. LEFKOWITZ

*Attorney General of the  
State of New York*

JEAN M. COON

*Assistant Solicitor General  
Attorney for Respondent*

Department of Law

The Capitol

Albany, New York 12224

MEMORANDUM DECISION OF THE COURT OF APPEALS.

[Printed in full in Appendix to Jurisdictional Statement; Officially reported at 39 NY 2nd 1021, 387 NYS 2nd 246, 355 NE 2nd 300]

ORDER OF THE COURT OF APPEALS, dated 7-13-76.

[ Printed in full in Appendix to Jurisdictional Statement ]

---

NOTICE OF APPEAL TO THE SUPREME COURT OF THE  
UNITED STATES.

[ Printed in full in Appendix to Jurisdictional Statement ]

---

JAN 13 1977

MICHAEL RODAK, JR., CLERK

---

IN THE  
**Supreme Court of the United States**  
October Term, 1976  
No. 76-616

---

THE STATE OF NEW YORK,

*Appellant,*

—against—

CATHEDRAL ACADEMY,

*Appellee.*

---

ON APPEAL FROM THE COURT OF APPEALS OF  
THE STATE OF NEW YORK

---

---

**MOTION TO DISMISS OR AFFIRM**

---

RICHARD E. NOLAN

*Attorney for Appellee*

1 Chase Manhattan Plaza

New York, New York 10005

Tel.: (212) 422-3400

THOMAS J. AQUILINO, JR.

LOWELL GORDON HARRISS

*Of Counsel*

---

## TABLE OF CONTENTS

	PAGE
Preliminary Statement .....	1
Opinions Below .....	1
Question Presented .....	2
Statement of the Case .....	2
The Mandated Services Act .....	3
Chapter 996 .....	5
Prior Proceedings .....	6
Jurisdiction .....	10
There Is No Substantial Federal Question .....	11
Conclusion .....	21

## TABLE OF AUTHORITIES

	PAGE
<i>Cases</i>	
<i>Committee for Public Education &amp; Religious Liberty v. Rockefeller</i> , 322 F. Supp. 678 (S.D.N.Y. 1971) .....	3
<i>Committee for Public Education &amp; Religious Liberty v. Levitt</i> , 342 F. Supp. 439 (S.D.N.Y. 1972) .....	4, 18
<i>Committee for Public Education &amp; Religious Liberty v. Nyquist</i> , 413 U.S. 756 (1973) .....	19
<i>Construction Laborers v. Curry</i> , 371 U.S. 542 (1963) .....	11
<i>Cox Broadcasting Corp. v. Cohn</i> , 420 U.S. 469 (1975) .....	11
<i>Lemon v. Kurtzman</i> , 310 F. Supp. 35 (E.D. Pa. 1969) .....	12
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971) .....	7, 13, 17, 19
<i>Lemon v. Kurtzman</i> , 348 F. Supp. 300 (E.D. Pa. 1972) ..	13
<i>Lemon v. Kurtzman</i> , 411 U.S. 192 (1973) .....	<i>passim</i>
<i>Levitt v. Committee for Public Education &amp; Religious Liberty</i> , 413 U.S. 472 (1973) .....	4, 5, 7, 17, 18
<i>Mills v. Alabama</i> , 384 U.S. 214 (1966) .....	11
<i>Radio Station WOW, Inc. v. Johnson</i> , 326 U.S. 120 (1945) .....	11
<i>Roemer v. Board of Public Works of Maryland</i> , 49 L. Ed.2d 179 (1976) .....	19

*Constitution*

U.S. Const. amend. 1 .....	2, 3, 4, 12, 13, 14, 19, 20
----------------------------	-----------------------------

*Statutes and Rules*

28 U.S.C. § 1257 .....	10, 11
28 U.S.C. § 2281 .....	3
28 U.S.C. § 2284 .....	3
[1970] Laws of N.Y. ch. 138 .....	2, 3, 4, 5, 17, 18, 20
[1972] Laws of N.Y. ch. 996 .....	2, 5, 6, 7, 10
[1968] Laws of Pa. No. 109, Pa. Stat. tit. 24, §§ 5601-09 .....	12
U.S. Sup. Ct. Rule 16 .....	1

IN THE  
**Supreme Court of the United States**

October Term, 1976

No. 76-616

---

THE STATE OF NEW YORK,

*Appellant,*

—against—

CATHEDRAL ACADEMY,

*Appellee.*

---

ON APPEAL FROM THE COURT OF APPEALS OF  
THE STATE OF NEW YORK

---

**MOTION TO DISMISS OR AFFIRM**

---

Pursuant to this Court's request of December 14, 1976, appellee moves under Rule 16 to dismiss this appeal as not presenting a substantial federal question in light of *Lemon v. Kurtzman*, 411 U.S. 192 (1973), or, in the alternative, to affirm the order appealed from.

**Opinions Below**

The memorandum decision on July 13, 1976 of the Court of Appeals<sup>1</sup> is reported at 39 N.Y.2d 1021, 387 N.Y.S.2d 246, 355 N.E.2d 300. The dissenting opinion in the Appellate

---

<sup>1</sup> Appendix A to Appellant's Jurisdictional Statement.

Division<sup>2</sup> which was adopted by the majority of the Court of Appeals is reported at 47 App.Div.2d 396-400, 366 N.Y.S.2d 905-08.

### Question Presented

Whether New York may, under *Lemon v. Kurtzman*, 411 U.S. 192 (1973), provide for the equitable reimbursement of nonpublic schools for the cost of services rendered in reliance upon a prior statute authorizing ultimate payment by the State and which services were planned and budgeted for and rendered, in part, prior to a District Court decision, later affirmed by this Court, that the statute was unconstitutional.

### Statement of the Case

Chapter 996 of the 1972 Laws of New York<sup>3</sup> was enacted to correct an inequitable situation facing nonpublic schools in New York State which resulted from the coincidental timing of a decision of the United States District Court for the Southern District of New York, invalidating, on First Amendment grounds, the Mandated Services Act.<sup>4</sup> Pursuant to Chapter 996, appellee filed a claim for \$7,347.29 against the State of New York for reimbursement of monies budgeted for and expended during the second semester of the 1971-1972 school year in connection with various record-keeping and testing services, payment of which would have been made but for the District Court's intervening decision and injunction.

<sup>2</sup> Appendix B to Appellant's Jurisdictional Statement, pp. A10 to A16.

<sup>3</sup> Hereinafter "Chapter 996", Appendix E to Appellant's Jurisdictional Statement.

<sup>4</sup> [1970] Laws of N.Y. ch. 138.

### The Mandated Services Act

In the Mandated Services Act, the Legislature had declared that the State had the "duty and authority to provide the means to assure, through examination and inspection . . . that all of the young people of the state, regardless of the school in which they [we]re enrolled, [we]re attending upon instruction as required by the education law and [we]re maintaining levels of achievement." [1970] Laws of N.Y. ch. 138, §1. Section 2 provided that, for school years beginning after July 1, 1970, qualifying nonpublic schools such as appellee would be reimbursed on an average daily attendance basis for the expenses incurred in providing various testing and record-keeping services which these schools were required by state law to perform. Section 5 provided that the schools would be reimbursed each year in two installments, half of such costs to be reimbursed between January 15 and March 15, with the balance to be paid to the schools between April 15 and June 15.

On June 30, 1970, an action was commenced in the District Court, challenging the Mandated Services Act as violative of the Establishment and Free Exercise Clauses of the First Amendment and seeking a permanent injunction against its enforcement. The plaintiffs did not move, however, for a temporary restraining order or preliminary injunction, as the District Court noted on January 28, 1971 in granting their motion to convene a three-judge District Court pursuant to 28 U.S.C. §§2281, 2284. *See Committee for Public Education & Religious Liberty v. Rockefeller*, 322 F. Supp. 678, 681 n.4 (S.D.N.Y. 1971).

A hearing was set for April 8, 1971, but it was not held, and there were no proceedings before the Court until more than a year later. The case was ultimately briefed and

argued on April 11, 1972. On April 27, 1972, the Court, by a two-to-one majority, held the Mandated Services Act unconstitutional as contravening the Establishment Clause. *See Committee for Public Education & Religious Liberty v. Levitt*, 342 F.Supp. 439 (S.D.N.Y. 1972). However, final judgment, permanently enjoining the State from reimbursing the nonpublic schools for expenses incurred during the spring 1972 semester was not entered until June 1, 1972 when the 1971-1972 school year was virtually at an end.

The defendants, including appellee, appealed to this Court, which noted probable jurisdiction on November 6, 1972,<sup>5</sup> heard oral argument on March 19, 1973 and affirmed over a dissent the judgment of the District Court on June 25, 1973. *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472.

During the approximately 22-month period between commencement of the action and determination by the District Court of the unconstitutionality of the Mandated Services Act, appellee, as well as other nonpublic schools, filed claims for reimbursement of the costs of rendering the mandated services for the school year 1970-1971 and received reimbursement therefor in two payments during 1971 pursuant to Section 5 of the Act. In budgeting and otherwise planning for the 1971-1972 school year, appellee relied upon the eventual receipt of reimbursement for the expenses of rendering the mandated services<sup>6</sup> and filed a claim for reimbursement for that year. In January 1972, appellee re-

<sup>5</sup> 409 U.S. 977.

<sup>6</sup> Reliance by appellee was specifically found by the New York Court of Claims. *See infra*, p. 6. The dissenting opinion in the Appellate Division adopted by the Court of Appeals reflects acceptance of this finding. *See infra*, pp. 7-9.

ceived from the State \$7,347.28 in reimbursement for the first half of the 1971-1972 school year. Appellee expected to receive, and relied upon receiving, a second installment for providing the mandated services during the second half of the 1971-1972 school year. However, this payment was never made because of the District Court decision of April 27, 1972 and injunction of June 1, 1972.

### Chapter 996

Subsequent to the entry on June 1, 1972 of the District Court's permanent injunction in *Levitt*, enjoining enforcement of the Mandated Services Act, the Legislature enacted Chapter 996. This statute was enacted for the specific, but limited, purpose of correcting the inequitable situation in which nonpublic schools such as appellee had been placed due to the timing of the District Court's decision. Chapter 996 was designed to do equity to those nonpublic schools which had relied in budgeting and planning for the 1971-1972 school year upon receiving reimbursement for the total cost of rendering services mandated by the State, but which were prevented from being fully reimbursed.

Section 1 of Chapter 996 confers jurisdiction on the New York Court of Claims "to hear, audit and determine" claims of nonpublic schools such as appellee

against the state for reimbursement of the funds expended by them in rendering services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of health records, recording of personnel qualifications

and characteristics and the preparation and submission to the state of various other reports required by law or regulation.

The core of the statute is the recognition that nonpublic schools relied in budgeting for the 1971-1972 school year on receiving reimbursement for all of the expenses incurred during that year in providing the services mandated by the State.

#### *Prior Proceedings*

On September 6, 1972, appellee filed its claim for \$7,347.29 pursuant to Chapter 996. On November 20, 1973, appellee filed a motion for summary judgment, and the State cross-moved to dismiss the claim. The Court of Claims found as a matter of fact

that the claimant was one of the schools included within the provisions of Chapter 138 and in accordance therewith made application for reimbursement for services rendered in the school year 1970-1971 and was reimbursed by the State for that school year in two equal payments; that claimant budgeted for, relied upon and filed a similar application on or about November 5, 1971 for reimbursement for the school year 1971-1972 and the State reimbursed the claimant in January of 1972 for the first semester; and that the claimant rendered the required services for the remaining semester of the 1971-1972 school year and has not been reimbursed therefor.<sup>1</sup>

<sup>1</sup> *Cathedral Academy v. State of New York*, 77 Misc.2d 977, 978, 354 N.Y.S.2d 370, 372 (N.Y.Ct.Cl. 1974) (emphasis added).

Nevertheless, the Court of Claims dismissed appellee's claim on the ground that the Establishment Clause rendered Chapter 996 unconstitutional. *Cathedral Academy v. State of New York*, 77 Misc.2d 977, 354 N.Y.S.2d 370 (N.Y.Ct.Cl. 1974).

Appellee's position was that, as a matter of federal constitutional law under *Lemon v. Kurtzman*, 411 U.S. 192 (1973),<sup>\*</sup> discussed below at pages 11-20, a state is not prohibited from reimbursing nonpublic schools for expenses incurred in good faith in reliance on a statute which at the time of enactment was not clearly unconstitutional, pending the resolution of litigation concerning the constitutionality of the statute. However, the Court of Claims held that, because this Court had declared the Mandated Services Act unconstitutional in *Levitt*, the granting of appellee's claim under Chapter 996 "would have the effect of resurrecting Chapter 138 which the Supreme Court declared unconstitutional". 77 Misc.2d at 983, 354 N.Y.S.2d at 376.

The Appellate Division, by a 3-2 vote, affirmed the judgment of the Court of Claims. *Cathedral Academy v. State of New York*, 47 App.Div.2d 390, 366 N.Y.S.2d 900 (3d Dep't 1975). Presiding Justice Herlihy dissented on the ground that this case presented substantially the same situation as in *Lemon II*:

Pursuant to chapter 996 . . . , there is to be a post-audit to determine whether or not the mandated services had in fact been performed by the claimant. While

<sup>\*</sup> For the sake of clarity, this decision will be referred to hereinafter as "*Lemon II*", and this Court's prior decision, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), holding the underlying Pennsylvania statute unconstitutional on First Amendment grounds, will be referred to as "*Lemon I*".

it is true that in *Lemon II* there had presumably been active supervision of the affairs of the school so as to insure that the acts for which reimbursement was to be made were not at least directly for religious purposes, the postaudit, which in this case is to be performed by the Court of Claims, will necessarily establish whether or not the amounts claimed for mandated services constitute a furtherance of the religious purposes of the claimant . . . . As in the case of *Lemon II*, the single proposed payment for services rendered during the period of the presumed constitutionality of the former Mandated Services Act reflects no more than the school's reliance upon the promise of payment for their continuance to exist as institutions of education and providing a level of education required by the State. Indeed, the majority recognize that in *Lemon II* "a constitutional interest arising from the payments was assumed for the purpose of discussion" and yet would undermine the constitutional sanctioning of a one-time payment where there had been reliance upon a presumably constitutional enactment. The failings of the Mandated Services Act and the enactments of Pennsylvania and Rhode Island, while distinguishable for purposes of understanding what will not be permitted in regard to State enactments which provide aid to religious institutions, have no immediately perceivable impact upon the consideration of whether or not a subsequent payment may be made for reliance where the statutes brought under constitutional attack are not upon their face patently an abridgement of the Constitution. The Legislature recognized a moral obligation to reimburse the schools for

monies already budgeted and expended. 47 App.Div.2d at 396-97, 366 N.Y.S.2d at 905-06 (footnote omitted; emphasis in original).

He found that, far from "resurrecting" the Mandated Services Act,

the actual effect of chapter 996 of the Laws of 1972 is to close out the former Mandated Services Act and recognize its unconstitutionality instead of attempting to resurrect the same. In any event, Mandated Services Act . . . and chapter 996 of the Laws of 1972 are readily distinguishable.\*

Further:

. . . [I]t is readily apparent that it was never the intent of the Legislature that any of its funds were to be allowed for the furtherance of religious purposes. In this regard, the audit of the claims by the Court of Claims must serve the same purpose as the final post audit which was referred to in *Lemon II* . . . . Accordingly, the burden will be upon the claimant to prove that the items of its claim are in fact solely for mandated services and the burden will be upon the Court of Claims to make appropriate findings in regard thereto. 47 App.Div.2d at 908, 366 N.Y.S.2d at 908.

\* 47 App.Div.2d at 398, 366 N.Y.S.2d at 907. The other dissenting opinion concluded as follows:

The instant case comes directly within *Lemon II*. The interests of fairness and justice dictate upholding a one-time reimbursement for past services authorized by this statute. 47 App.Div.2d at 401-02, 366 N.Y.S.2d at 910.

On July 13, 1976, the New York Court of Appeals, by a 4-to-3 majority, rendered the following decision:

Order reversed, with costs, and the claim reinstated on the dissenting opinion by then Presiding Justice J. Clarence Herlihy at the Appellate Division (47 AD2d 390, 396).

The State appeals to this Court from this decision.

### **Jurisdiction**

Appellant invokes the jurisdiction of this Court under 28 U.S.C. §1257(2), which provides that this Court may review final judgments or decrees rendered by the highest court of a state in which a decision could be had as follows:

... By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Appellee concurs with appellant's contention at page 3 of its Jurisdictional Statement that the determination of the New York Court of Appeals is final as to the question of the constitutionality of Chapter 996, the underlying statute. Entry of judgment on behalf of appellee pursuant to this statute can no longer be foreclosed in any court of the State of New York on the ground that the judgment is violative of the Establishment Clause of the First Amendment. In addition, the Court of Appeals, by adopting the dissenting opinion of Presiding Justice Herlihy, which held that the Chapter 996 was not violative of the New York

Constitution, has clearly foreclosed any contrary decision by any court of state constitutional issues.

This Court has recently analyzed 28 U.S.C. §1257(2) in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-87 (1975). We submit that the case at bar falls at least within category one of this analysis because "the federal issue is conclusive"<sup>10</sup> and within category two of this analysis because

the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings. 420 U.S. at 480.

See, e.g., *Mills v. Alabama*, 384 U.S. 214, 217-18 (1966); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 123-27 (1945). See also *Construction Laborers v. Curry*, 371 U.S. 542 (1963).

### **THERE IS NO SUBSTANTIAL FEDERAL QUESTION**

The only question presented on this appeal is the application of the facts of this case to the constitutional principles enunciated in *Lemon II*. The New York Court of Appeals found the facts to be substantially similar to those of *Lemon II* and reversed summarily. Appellee submits that the facts of this case are virtually identical to those of *Lemon II*: Since the Court of Appeals correctly applied *Lemon II*; since the decision below does not conflict with other decisions of this Court or other courts; and since the question presented only involves the application of facts

<sup>10</sup> 420 U.S. at 479.

to settled principles of federal law, no substantial federal question is presented.

In *Lemon II*, this Court held that the Establishment Clause does not prohibit a state from paying funds on a limited, one-time basis to nonpublic schools which had relied in good faith upon receipt of such funds pursuant to a state statute which was subsequently held to be unconstitutional, but as to which there had been a reasonable basis for presuming the statute to be valid.

The *Lemon* case arose out of Pennsylvania's enactment in 1968 of the Nonpublic Elementary and Secondary Education Act<sup>11</sup> which authorized reimbursement of nonpublic schools for the salaries of teachers of mathematics, modern foreign languages, physical science and physical education. The nonpublic schools were reimbursed "in four equal installments payable on the first day of September, December, March and June of the school term following the school term in which the secular educational service was rendered". Act 109, §7(a), Pa. Stat. tit. 24, §5607(a). In January 1969, Pennsylvania entered into contracts with nonpublic schools to purchase services for the 1968-1969 school year.

In June 1969, an action was brought, seeking declaratory and permanent injunctive relief against enforcement of Act 109. The plaintiffs filed, but subsequently abandoned, a motion for a preliminary injunction. On November 29, 1969, a three-judge District Court granted a motion to dismiss the complaint. *Lemon v. Kurtzman*, 310 F.Supp. 35 (E.D.Pa. 1969). The plaintiffs appealed to this Court,

<sup>11</sup> [1968] Laws of Pa. No. 109, Pa. Stat. tit. 24, §§5601-09 [hereinafter "Act 109"].

which ultimately heard oral argument on March 3, 1971. On June 28, 1971, the Court, by a divided vote, declared the statute violative of the Establishment Clause on the ground that the state was constitutionally compelled to assure that the payments were not being used for religious indoctrination and that the ongoing surveillance necessary to accomplish this result created an excessive entanglement between church schools and the state. *Lemon I*, 403 U.S. 602 (1971).

The case was thereupon remanded to the District Court, which in December 1971 entered an order enjoining the defendants "from making payments for services performed or costs incurred for any period subsequent to June 28, 1971". *Lemon v. Kurtzman*, 348 F.Supp. 300, 201 n.1 (E.D. Pa. 1972) (emphasis added). Because payments for services rendered during the 1970-1971 school year were to be made in September and December of 1971, the effect of the order was to permit the state to reimburse nonpublic schools for the second semester of the 1970-1971 school year in December 1971, a date well after this Court had held the underlying statute to be unconstitutional.

The plaintiffs argued in the District Court that no payments could be made subsequent to the date of the decision of this Court. The three-judge District Court unanimously rejected this argument, finding no constitutional impediment to reimbursement after the statute was held unconstitutional for services rendered prior to that declaration. The court stressed the equitable considerations of the nonpublic schools' "reliance" on reimbursement for the entire 1970-1971 school year by "adjust[ment of] their budgets accordingly and perform[ance of] the services required by them." 348 F.Supp. at 304.

The plaintiffs again appealed to this Court, which affirmed in *Lemon II* the District Court's judgment. The Court rejected, as a principle of constitutional law, the argument that payments subsequent to a declaration of unconstitutionality of an underlying statute were invalid *per se* under the Establishment Clause, but rather viewed the matter as the "process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old." 411 U.S. at 198. This process is, the Court explained, equitable in nature:

In shaping equity decrees, the trial court is vested with broad discretionary power . . . . Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable. "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private need." . . .

In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots. 411 U.S. at 200, 201 (citations and footnotes omitted).

This Court thus enunciated a test of balancing "constitutional" and "reliance" interests in determining whether reimbursement is permissible after a declaration of invalidity for services rendered in good faith prior to that judicial declaration. As for the constitutional interests, the Court, after noting that "[t]he constitutional fulcrum of *Lemon I* was the excessive entanglement of church and

state," observed that the one-time payment of \$24,000,000 to nonpublic schools "will not substantially undermine the constitutional interests at stake in *Lemon I*." 411 U.S. at 201. This Court noted problems having constitutional "overtones", but held that they were "minimal" or outweighed by "reliance" considerations. Rejecting the contention that the remaining final audit would engender excessive entanglement, the Court observed:

. . . [T]here is the question of impinging on the Religion Clauses from the fact of *any* payment that provides any state assistance or aid to sectarian schools—the issue we did not reach in *Lemon I*. Yet even assuming a cognizable constitutional interest in barring any state payments, under the District Court holding that interest is implicated only once under special circumstances that will not recur. There is not present risk of significant intrusive administrative entanglement, since only a final postaudit remains and detailed state surveillance of the schools is a thing of the past. At the same time, that very process of oversight—now an accomplished fact—assures that state funds will not be applied for any sectarian purposes. Finally, as will appear, even this single proposed payment for services long since passing state scrutiny reflects no more than the schools' reliance on promised payment for expenses incurred by them prior to June 28, 1971. 411 U.S. at 202-03 (footnote omitted; emphasis in original).

This Court, in applying the balancing test, then considered the "private" or "reliance" interest involved:

Offsetting the remote possibility of constitutional harm from allowing the State to keep its bargain are the expenses incurred by the schools in reliance on the state statute inviting the contracts made and authorizing reimbursement for past services performed by the schools. 411 U.S. at 203 (footnote omitted).

The Court found there was sufficient evidence in the record of such reliance and emphasized that:

The significance of appellee schools' reliance is reinforced by the fact that appellants' tactical choice not to press for interim injunctive suspension of payments or contracts during the pendency of the *Lemon I* litigation may well have encouraged the appellee schools to incur detriments in reliance upon reimbursement by the State under Act 109. 411 U.S. at 204.

With respect to the issue of reliance, the plaintiffs argued that the nonpublic schools should not have relied on reimbursement because of the "constitutional cloud" over the statute and because the constitutionality of Act 109 had not been finally adjudicated when the contracts for the 1970-1971 school year were made. This Court held that the unconstitutionality of Act 109 had not been clearly foreshadowed by prior decisions<sup>13</sup> and rejected a rule of law that

would have state officials stay their hands until newly enacted state programs are "ratified" by the federal courts, or risk draconian, retrospective decrees should the legislation fall. 411 U.S. at 207.

<sup>13</sup> See 411 U.S. at 206-07 n.7.

The Court held that the equities of reliance by the nonpublic schools on the expectation of reimbursement outweighed the "remote possibility of constitutional harm" and affirmed the judgment of the District Court.

Appellee submits that *Lemon II* is controlling on the substantive issue involved in this appeal and that there is no proper basis for any significant distinction between that case and the case at bar. First, the Court of Claims found as a fact that appellee relied in its budgeting and other plans for the 1971-1972 school year upon the expectation of reimbursement under the Mandated Services Act for services rendered during the second half of the 1971-1972 school year.<sup>14</sup> In addition, the plaintiffs in *Levitt*, like those in *Lemon*, sought no preliminary injunctive relief, thus postponing any ruling at the District Court level on the merits of the constitutionality of the Mandated Services Act for almost 22 months. That this decision not to move for preliminary relief was motivated by "tactical considerations" as in *Lemon* is not unlikely.

Second, the decision of this Court in *Levitt*, as in *Lemon I*, was not "clearly foreshadowed" by prior decisions. The entire area of permissible or impermissible aid to nonpublic schools, or to the pupils in these schools or their parents, has been the subject of continuous development under the Constitution. Any claim that the outcome of the Mandated Services Act litigation in the *Levitt* case was clearly foreshadowed either in the District Court or in this Court is simply naive. This is clearly shown by

<sup>14</sup> See *supra*, p. 6. Indeed, this Court indicated in *Lemon II* that reliance by nonpublic schools in circumstances such as these can be assumed. See 411 U.S. at 205 and n.6.

several events relating to that case. A three-judge District Court was convened to decide the constitutionality of the Mandated Services Act, then an appropriate procedure only if a substantial constitutional question—not decided by prior litigation—existed. The District Court's decision was not unanimous; one judge filed a vigorous dissent. When the defendants appealed, this Court did not summarily affirm the District Court's order, but rather required full briefing and oral argument. Finally, not only was there a dissent, but even the opinion of this Court indicated that reimbursement for certain required services may be constitutional. *See* 413 U.S. at 482.<sup>14</sup>

Therefore, for purposes of the balancing test set forth in *Lemon II*, there can be no doubt that appellee did rely on being reimbursed for the costs of rendering the services mandated by the State and that appellee's reliance on the presumptive validity of the Mandated Services Act was justifiable. New York's highest court did not hold otherwise.

Appellant herein argues at page 18 of its jurisdictional statement that an "audit" within the meaning of Section 1 of Chapter 996 of appellee's claim by the Court of Claims would entail "excessive entanglement with religion in the auditing function". This rigid position ignores the fact that *Lemon II* represents an effort by this Court to take, in limited circumstances where reliance and ensuing hardship can be shown in connection with statutes which are not patently unconstitutional, a flexible approach whereby

<sup>14</sup> In addition, the concurring opinion considered that affirmance was compelled by two decisions of the Court which were handed down on the very same day as that in *Levitt*. *See* 413 U.S. at 482.

hardships can be ameliorated without significant constitutional injury. Neither the purpose of the Establishment Clause, nor the equitable basis of *Lemon II* nor simple logic requires that application of *Lemon II* be limited to situations admitting of absolutely no variations from its factual pattern.

*Lemon II* does not require that courts apply to a case involving final equitable reimbursement the same three constitutional tests<sup>15</sup> which are applied in evaluating the validity of original legislation. Rather, *Lemon II* involved a balancing of considerations relating to justifiable reliance by the schools and those relating to the nature and degree of possible injury to Establishment Clause values.

There is no prospect of "tangible" or substantial constitutional injury under Chapter 996 for several reasons: First, a one-time payment, as this Court recognized in *Lemon II*, presents a relatively small potential for constitutional injury. Indeed, the Court, in formulating its balancing test, referred to the payment of the final installment of \$24,000,000 under the Pennsylvania statute as involving a "remote possibility of constitutional harm".<sup>16</sup> Secondly,

<sup>15</sup> *See, e.g., Lemon I*, 403 U.S. at 612-13; *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 772-73 (1973).

<sup>16</sup> 411 U.S. at 203. As this Court stated in *Hunt v. McNair*, 413 U.S. 734 (1973):

... [T]he Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends. 413 U.S. at 743.

*See also Roemer v. Board of Public Works of Maryland*, 49 L. Ed.2d 179, 188 n. 14 (1976), and cases cited therein.

all services reimbursable in this case were performed and paid for by the nonpublic schools out of their own funds over four years ago during the winter and spring of 1972 so that there is no risk of any furtherance of sectarian activity at this time. Finally, the "remote possibility of constitutional harm" discussed by this Court in *Lemon II* is even more remote here. To quote from the dissenting Appellate Division opinion of Presiding Justice Herlihy, adopted as the majority opinion of the Court of Appeals:

. . . [T]he burden will be upon the claimant to prove that the items of its claim are in fact solely for mandated services and the burden will be upon the Court of Claims to make appropriate findings in regard thereto. 47 App.Div.2d at 400, 366 N.Y.S.2d at 908.

In short, this one-time equitable reimbursement cannot, by any stretch of the imagination, constitute a threat to the principles of the First Amendment. What is involved is simply limited equitable relief to appellee in an unusual situation in which it finds itself by reason of its good faith reliance on the validity of the Mandated Services Act.

### Conclusion

In view of the foregoing, the appeal herein should be dismissed for lack of a substantial federal question or, in the alternative, the judgment appealed from should be affirmed.

Dated: January 12, 1977

Respectfully submitted,

RICHARD E. NOLAN  
*Attorney for Appellee*  
1 Chase Manhattan Plaza  
New York, New York 10005  
Tel.: (212) 422-3400

THOMAS J. AQUILINO, JR.  
LOWELL GORDON HARRISS  
*Of Counsel*

APR 7 1977

MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

NO. 76-616

---

THE STATE OF NEW YORK,

Appellant,

against

CATHEDRAL ACADEMY,

Appellee.

Appeal from the Court of Appeals of the State of New York.

---

**BRIEF FOR APPELLANT**

---

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
Attorney for Appellant  
The Capitol  
Albany, New York 12224  
Telephone: (518) 474-7138

RUTH KESSLER TOCH  
Solicitor General

JEAN M. COON  
Assistant Solicitor General

KENNETH CONNOLLY  
Assistant Attorney General

of Counsel

## TABLE OF CONTENTS

	Page
Citations to Opinions Below .....	1
Jurisdiction .....	2
Constitutional and Statutory Provisions Involved .....	3
Questions Presented for Review .....	5
Statement of the Case .....	5
Summary of Argument .....	12
Argument	
Point I — This Court has jurisdiction of this appeal since the order appealed from is final in effect and leaves no issue for determination by the Trial Court which could ultimately be reviewed by this Court. In addition, the carrying out of the decision of the New York Court of Appeals would involve the Court of Claims in excessive and unconstitutional entanglement between church and state .....	13
A. The order appealed from is final in effect so far as issues subject to the appellate jurisdiction of this Court are concerned .....	13
B. The carrying out of the decision of the New York Court of Appeals would require an in depth examination by the Court of Claims of the services for which reimbursement is made resulting in an excessive entanglement between church and state .....	14
Point II — An award to appellee of moneys representing payments due under chapter 138 of the Laws of 1970, a statute previously held unconstitutional, would have the primary effect of supporting a religious institution in violation of the provisions of the Constitution of the United States .....	17
Conclusion .....	29
Appendix .....	A-1

## TABLE OF AUTHORITIES

## Page

## CASES

Abington School District v. Schempp, 374 U.S. 203 ..	21, 22, 24
Board of Education v. Allen, 392 U.S. 236 .....	20
Cathedral Academy v. State of New York, 77 Misc 2d 977, affd. 47 A D 2d 390, revd. 39 N Y 2d 1021 .....	23
Committee for Public Education and Religious Liberty v. Levitt, 342 F. Supp. 439, affd. <i>sub. nom.</i> Levitt v. Committee, 413 U.S. 472 .....	2, 5, 6, 7
Committee for Public Education and Religious Liberty v. Levitt, — F. Supp. — .....	23
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 .....	14
Engel v. Vitale, 370 U.S. 421 .....	20, 21
Everson v. Board of Education, 330 U.S. 1 .....	18, 19, 20, 23
Illinois ex rel. McCollum v. Board of Education of School District No. 71, 333 U.S. 203 .....	20
Lemon v. Kurtzman (Lemon I), 403 U.S. 602 .....	16
Lemon v. Kurtzman (Lemon II), 411 U.S. 192 .....	2, 8, 9, 11, 24, 26, 28
McGowan v. Maryland, 366 U.S. 420 .....	20
Torcaso v. Watkins, 367 U.S. 488 .....	20
Walz v. Tax Commission of New York City, 397 U.S. 664 ....	15
Zorach v. Clauson, 343 U.S. 306 .....	21

## CONSTITUTION

United States Constitution, Amendment One .....	2, 3
United States Constitution, Amendment Fourteen .....	3

## Page

## STATUTES

28 United States Code, § 1257(2) .....	3, 13, 23
New York Laws, 1970, ch. 138 .....	4, 6, 7, 8, 14, 17, 23
New York Laws, 1972, ch. 996 .....	2, 3, 4, 8, 14, 17
New York Laws, 1974, ch. 507 .....	23
New York Laws, 1974, ch. 508 .....	23

## MISCELLANEOUS

Clark, <i>Religion and the Law</i> , 15 S.C.L. Rev. 855 .....	23
Cobb, <i>The Rise of Religious Liberty in America</i> .....	19
Madison, <i>Memorial and Remonstrance</i> .....	19, 21

In the  
**Supreme Court of the United States**  
OCTOBER TERM, 1976  
NO. 76-616

---

THE STATE OF NEW YORK,

Appellant,

against,

CATHEDRAL ACADEMY,

Appellee.

Appeal from the Court of Appeals of the State of New York.

---

**BRIEF FOR APPELLANT**

**Citations to Opinions Below**

The Court of Appeals of the State of New York did not render any opinion, rather the majority reversed the order of the Appellate Division of the New York Supreme Court, Third Judicial Department, on the basis of the dissenting opinion in the Appellate Division, and the dissenting judges in the Court of Appeals relied upon the majority opinion in the Appellate Division. The memorandum decision of the Court of Appeals is reported at 39 NY 2d 1021, 387 N.Y.S. 2d 246, 355 N.E. 2d 300 (printed in Appendix to Jurisdictional Statement of Appellant). The opinions of the Appellate Division are reported at 47 AD 2d 390, 366 N.Y.S. 2d 900 (printed in Appendix to Jurisdictional Statement of Appellant). The opinion of the Court of Claims of the State of New York is reported at 77 Misc 2d 977, 354 N.Y.S. 2d 370.

**Jurisdiction**

The appeal herein is from a final order of the Court of Appeals of the State of New York, reversing an order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, which affirmed the judgment of the New York State Court of Claims dismissing the claim which had been filed pursuant to chapter 996 of the New York Laws of 1972, and which sought reimbursement for certain expenses for the 1971-72 school year which would have been made by the State but for the declaration of unconstitutionality by the Court in *Committee for Public Education and Religious Liberty v. Levitt* (342 F. Supp. 439 [S.D.N.Y., 1972], affd. 413 U.S. 472 [1973]) of the underlying statutory authorization for payment.

The Court of Claims had held chapter 996 unconstitutional under the Establishment Clause of the First Amendment to the Constitution of the United States. The Appellate Division affirmed. The reversal by the Court of Appeals was based on the dissenting opinion of then Presiding Justice HERLIHY in the Appellate Division, which would have held the statute constitutional and the claim thereunder valid under the decision of this Court in *Lemon v. Kutzman* (411 U.S. 192 [referred to hereafter as *Lemon II*]), and would have had the Court of Claims adjudicate the question of whether the amounts claimed for reimbursement had been expended for purposes constituting a furtherance of the religious purposes of the claimant.

The claim here involved is one of more than 2,000 claims filed pursuant to chapter 996, and was selected for trial to test the validity of chapter 996; the remaining claims are still pending untried. The State moved to dismiss the claim, alleging its unconstitutionality under the First Amendment to the Constitution of the United States and various State constitutional grounds. The Court of Claims granted the motion to dismiss on Federal constitutional grounds. The Appellate Division's affirmance and the Court of Appeals' reversal were on the same basis, that is, the constitutionality of chapter 996 under the United States Constitution.

The order of the Court of Appeals was entered July 13, 1976. Notice of Appeal on behalf of the State of New York was filed on September 1, 1976. The appeal was docketed October 29, 1976. On February 22, 1977, this Court ordered that "Further consideration of the question of jurisdiction is postponed to the

hearing of the case on the merits."

The Supreme Court of the United States has jurisdiction to review by direct appeal the order above cited pursuant to the terms of 28 United States Code, section 1257(2).

### **Constitutional and Statutory Provisions Involved**

The constitutional provision involved is the Establishment of Religion Clause of the First Amendment to the Constitution of the United States, which provides:

"Congress shall make no law respecting the establishment of religion \* \* \*."

The prohibition of that amendment has been made applicable to the States by virtue of the Fourteenth Amendment to the Constitution of the United States.

Chapter 996 of the New York Laws of 1972 provides in pertinent part (the full text is set out as an appendix to this brief):

"Section 1. Jurisdiction is hereby conferred upon the court of claims to hear, audit and determine the claim or claims of nonprofit schools in the state, other than public schools, against the state for reimbursement of the funds expended by them in rendering services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports required by law or regulation. The base of said claim or claims is that the State of New York represented to said schools that they would be reimbursed for such expenses incurred after July first, nineteen hundred seventy; that the said State knew that said schools were relying on said representation; that said representation was an effective cause of said expenses by said schools; and that without any fault on the part of said schools complete reimbursement has not been paid to them, though due and owing. As such, said claim or claims are founded in right and justice, or in law or equity.

"Sec. 2. In hearing, auditing and determining such claim or claims, the court of claims is hereby authorized to consider, inter alia:

(a) That prior to July first, nineteen hundred seventy, said nonprofit schools, rendered services for examination and inspection in connection with administering, grading and the compiling and reporting of the results of tests and examination, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualification and characteristics and the preparation and the submission to the state of various other reports as provided for or required by law or regulation;

\* \* \*

(c) That \* \* \* appropriations were made to the education department to enable the department to reimburse such schools for the rendering of such services;

\* \* \*

(e) That the federal courts, by various orders enjoined payments to such schools. As a result reimbursement for the full period July first, nineteen hundred seventy-one to June thirtieth, nineteen hundred seventy-two, has not been made to such schools, although all such services were or will be duly performed;

\* \* \*

"Sec. 3. If the court finds that such claim or claims or any of them were founded in right and justice or in law and equity against the state of New York, and are in right and justice presently payable thereby, the state shall be deemed to have been liable therefor and such claim or claims shall constitute legal and valid claims against the state, and the court may award and render judgments for the claimants as shall be just and equitable \* \* \*."

Chapter 138 of the New York Laws of 1970, held unconstitutional by this Court in *Levitt v. Committee for Public Education and Religious Liberty* (413 U.S. 472), provided for payments to nonpublic schools, in the amount of \$27 for each pupil in grades one through six and \$45 for each pupil in grades seven through twelve, for the same examinations and record keeping services as are referred to in chapter 996.

### Questions Presented for Review

1. Where a statute authorizing payments to nonpublic schools for testing and record keeping services was held to be unconstitutional by this Court as in violation of the First Amendment to the Constitution of the United States, does that declaration of invalidity bar the New York State Legislature from authorizing the filing of claims by nonpublic schools in the New York State Court of Claims for reimbursement of the payments so held to be unconstitutional for the remainder of the school year in which the statute was declared unconstitutional?

2. Regardless of the prior decision of this Court relative to the underlying statute, would the payment of the claim herein constitute a violation of the Establishment of Religion Clause of the First Amendment to the Constitution of the United States?

3. Regardless of the prior decision of this Court relative to the underlying statute, would the audit of this claim by the State Court of Claims, including an examination of the use of the funds and the services rendered in each case, as envisaged by the Court of Appeals' decision, to determine whether the reimbursement would further the religious purposes of the claimant, constitute an impermissible entanglement between church and state in violation of the Establishment Clause?

### Statement of the Case

In 1970, the New York State Legislature appropriated \$28,000,000 to compensate nonpublic schools for the expenses of record keeping and testing required by State law or regulation (chapter 138 of the Laws of 1970). That statute, effective July 1, 1970, was the subject of an action, commenced June 30, 1970, entitled *Committee for Public Education and Religious Liberty, et al. v. Levitt and Nyquist*. Appellee herein and several other nonpublic schools intervened in the action as parties defendant. Although the action was commenced before the effective date of the act, no preliminary injunction was sought, at that time to restrain payments pursuant to the statute. Consequently, appellee and other nonpublic schools received payments under the act for the entire 1970-71 school year and received the first of two payments scheduled for the 1971-72 school year. On April 11, 1972, four days before the earliest date on which the second

payment for that year could have been made, a three-judge United States District Court issued a preliminary injunction restraining the making of that payment and, on April 27, 1972, handed down a final decision in which the majority held chapter 138 to be unconstitutional as in violation of the Establishment Clause of the First Amendment to the Constitution of the United States (342 F. Supp. 439). The defendants in that case, including the State defendants and appellee herein, appealed to this Court, which affirmed the District Court judgment (*Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472 [1973]).

Immediately following the District Court decision, the New York State Legislature passed a bill which became chapter 996 of the New York Laws of 1972, authorizing the New York State Court of Claims to hear and determine claims by nonpublic schools for reimbursement for the sums which they would have received in 1972, but for the District Court decision.

Appellee is one of the over 2,000 schools which filed claims aggregating approximately \$11,000,000. The claim herein, for \$7,347.29, represents the sum appellee would have received in the latter part of the 1971-72 school year, pursuant to chapter 138, but for the holding of unconstitutionality. This claim was selected as a test case as to the validity of chapter 996. Appellee moved for summary judgment and the State cross-moved for the dismissal of the claim.

Dismissing the claim, the State Court of Claims based its determination on the holding of this Court in the *Levitt* case, *supra*, which held that the predecessor statute of chapter 996, chapter 138 of the Laws of 1970, was unconstitutional. In so doing, that Court held (51):\*

"\* \* \* that the implementation of chapter 996, in the form of an award of a payment to the claimant, would be constitutionally impermissible as violative of the Establishment Clause of the First Amendment to the Constitution of the United States and bases its decision upon the holdings made in the majority opinion of Mr. Chief Justice Burger in *Levitt, supra*."

\* Numbers in parentheses, unless otherwise indicated, refer to page numbers of the Appendix on this appeal.

The Court of Claims in the instant case found significant the discussion in this Court's opinion in *Levitt* which stated (413 U.S. pp. 479-480):

"As noted previously, Chapter 138 provides for a direct money grant to sectarian schools for performance of various 'services.' Among those services is the maintenance of a regular program of traditional internal testing designed to measure pupil achievement. Yet, despite the obviously integral role of such testing in the total teaching process, no attempt is made under the statute, and no means are available to assure that internally prepared tests are free of religious instruction.

"We cannot ignore the substantial risk that these examinations prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church. We do not 'assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment.' *Lemon v. Kutzman*, 403 U.S. at 618. But the potential for conflict 'inheres in the situation,' and because of that the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination. See *id.*, at 617, 619. Since the State has failed to do so here, we are left with no choice under *Nyquist* but to hold that Chapter 138 constitutes an impermissible aid to religion; this is so because the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities."

The Court of Claims here also referred to that part of the Supreme Court decision which held the lump sum payments provided by chapter 138 inseparable as between constitutional and unconstitutional uses (413 U.S., pp. 481-482):

"We hold that the lump sum payments under Chapter 138 violate the Establishment Clause. Since Chapter 138 provides only for a single per pupil allotment for a variety of specified services, some secular and some potentially religious, neither this Court nor the District Court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reimbursable secular services. That is a legislative, not a judicial function."

Analyzing the provisions of chapter 138 of the Laws of 1970 and chapter 996 of the Laws of 1972, the Court of Claims found that claims pursuant to chapter 996 are based upon payment for services rendered under chapter 138 and that an award to the claimant would result in the resurrection of chapter 138 which this Court has declared to be unconstitutional (53).

The Court of Claims also considered the claimant's contention that payment under chapter 996 is authorized by the holding of this Court in *Lemon II, supra*. Rejecting that argument, the Court of Claims held (53-55):

"As applied to the facts of the instant claim we disagree because in *Lemon II* the Supreme Court, after remand, found that any payments there allowed 'will not be applied for any sectarian purposes' (see pp. 202, 203), whereas in *Levitt* the Court found that 'the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities' (see p. 480).

"In *Lemon II*, in affirming the judgment of the three-judge District Court of the Eastern District of Pennsylvania entered after remand, Mr. Chief Justice Burger, in an opinion joined in by three other justices, made a specific finding that the State funds there involved would not be applied for any sectarian purposes, stating on pages 202, 203:

" 'Yet even assuming a cognizable constitutional interest in barring any state payments, under the District Court holding, that interest is implicated only once under special circumstances that will not recur. There is no present risk of significant intrusive administrative entanglement, since only a final post-audit remains and detailed state surveillance of the schools is a thing of the past. At the same time, that very process of oversight — now an accomplished fact — assures that state funds will not be applied for any sectarian purposes. Finally, as will appear, even this simple proposed payment for services long since passing state scrutiny reflects no more than the schools' reliance on promised payment for expenses incurred by them prior to June 28, 1971.' "

"The reimbursement in *Lemon II*, affirmed by the Supreme Court, was found allowable because of the very reason the statute was struck down, i.e., the excessive entanglement by the State of Pennsylvania. Such process of oversight by the state, in the form of auditing, assured that state funds

would not be applied for any sectarian purposes. Hence, the Supreme Court reasoned after, even assuming a cognizable constitutional interest in barring any state payments under the Pennsylvania statute, any payments to the schools would not and could not be applied by them in aid of sectarian purposes. That essential assurance is lacking in Chapters 138 and 996."

The Court of Claims in the instant action not only referred to the holding of this Court that the lump sum aid provided under chapter 138 was inseparable as between sectarian and secular uses, but also held that chapter 996 had not made that separation and did not include any standards or guidelines by which the Court of Claims could make the determination. The Court concluded that those guidelines should be established by the Legislature, not the Courts.

The Court's decision, dismissing this claim, was specifically stated not to affect claims which may have been filed by non-sectarian schools. Judgment was entered on the decision on April 22, 1974. On May 13, 1974, claimant filed a notice of appeal.

Affirming the dismissal of the claim, the majority of the Appellate Division of the State Supreme Court (HERLIHY, P.J., and LARKIN, J., dissenting) denied the applicability to the facts of the instant case of the decision of this court in *Lemon II*. Distinguishing the cases and the principles involved, the Court stated (Appendix to Jurisdictional Statement, pp. A6-A7):

"In striking down the Pennsylvania statute in *Lemon I*, the court focused upon the fact that the requirement of ongoing scrutiny as above described fostered an 'excessive entanglement' between church schools and state. The validity of the payments themselves, on the facts there presented, was not determined — that issue did not arise until the question of reimbursement was raised in *Lemon II* (see 411 U.S. at 202). In allowing those payments to be made, the Supreme Court stated that reliance interests had significant weight in the shaping of an equitable remedy. However, those reliance interests were weighed not in a vacuum, but, rather, in the context of the 'remote possibility of constitutional harm \*\*\*' (*Lemon II, supra*, 411 U.S. at 203). That remoteness was founded upon the fact that entanglements in the nature of inspection, audit, and the like had already occurred, wherefore 'payment \* \* \* will compel no further State oversight of the instructional processes \* \* \*'. Moreover, and perhaps more significant to a consideration

of the case at bar, 'that very process of oversight — now an accomplished fact — assures that state funds will not be applied for any sectarian purposes.' (*Lemon II, supra*, 411 U.S. at 202.). In reaching this conclusion, the court took notice the existence of an 'insoluble paradox' inherent in the fact that payments to religious schools could not be made without some assurance that they would be applied only to secular purposes, yet such assurances could not be provided without engaging in the forms of oversight constituting entanglements of a sort prohibited by *Lemon I*. In *Lemon II*, the 'insoluble paradox' was 'avoided because the entangling supervision prerequisite to state aid has already been accomplished and need not enter into [an] evaluation' of the payments to be made (*Lemon II, supra*, 411 U.S. at 203, n. 3). In the case at bar, on the other hand, the paradox is squarely presented."

The Appellate Division thereupon concluded (A8):

"We are of the view that the paradox cannot be resolved without sanctioning a violation of the religion clauses of the First Amendment, and therefore we affirm. The factor of greatest significance in leading us to this result is that in *Levitt*, the payments themselves were held to be unconstitutional because of the inability to identify secular purposes to which they would be applied. Nor has any relationship been shown between the payment formula and such supposed secular purposes; as the court noted, '[e]xactly how the \$27 and \$45 figures were arrived at is somewhat unclear.' (*Levitt, supra*, 413 U.S. at 476, n. 4.) For all its well-argued efforts to bring this case within the ambit of *Lemon II*, appellant has failed to demonstrate how payments under chapter 996 of the Laws of 1972 would differ in substance or form, in quality or quantity, from prohibited payments under the invalidated Mandated Services Act. Thus, if payments are to be made under chapter 996 pursuant to the same formula as had been in effect under the Mandated Services Act, a finding that such payments would be unconstitutional because not limited to identifiable secular purposes is inescapable. If, on the other hand, chapter 996 contemplates that appellant and other schools are to be reimbursed only for actual costs incurred in performing the mandated services, some process of audit, inspection and supervision, invalid under the standards set up in *Lemon I*, would now be required. Because of this fundamental distinction — the lack of an already-completed 'entangling'

process — the constitutional interests at stake in the present case are weightier than those in *Lemon II*, and cannot be overcome by appellant's reliance arguments." (Emphasis added.)

The members of the Court who dissented would have found a valid analogy with *Lemon II* and would further have found a moral obligation on the part of the State to make the one remaining payment for the 1971-72 school year. Presiding Justice HERLIHY, in his opinion, stated (Appendix to Jurisdictional Statement, p. A11):

"While it is true that in *Lemon II* there had presumably been active supervision of the affairs of the school so as to insure that the acts for which reimbursement was to be made were not at least directly for religious purposes, the post audit, which in this case is to be performed by the Court of Claims, will necessarily establish whether or not the amounts claimed for mandated services constitute a furtherance of the religious purposes of the claimant."

It is apparent from that sentence that the dissenters overlooked the fact that in *Lemon II* the auditing function, which was the unconstitutional factor, had already been performed prior to the claim for reimbursement whereas here it would be performed as part of the reimbursement process.

The order of the Appellate Division was entered on May 6, 1975 and on May 27, 1975, Cathedral Academy filed its notice of appeal to the New York State Court of Appeals. That appeal was argued June 7, 1976 and by decision dated July 13, 1976, the Court of Appeals, by a vote of four to three, reversed the order of the Appellate Division and reinstated the claim. No opinions were written in the Court of Appeals. The majority of the Court reversed based on the dissenting opinion in the Appellate Division. The dissenting judges in the Court of Appeals adopted the majority opinion of the Appellate Division.

### Summary of Argument

While the order appealed from appears to be non-final in that it reinstates a claim in the New York State Court of Claims and remands it for trial, that order is in reality final for the purpose of review by this Court since it finally determines virtually the only issue which could be presented to this Court for review, that is, whether Chapter 996 of the New York Laws of 1972 is unconstitutional and in violation of the Establishment Clause of the First Amendment to the Constitution of the United States. The Court of Claims, on remand, would have only two fact issues left to determine — the amount of state aid, computed on the basis of the number of pupils attending the school in 1972 multiplied by either \$27 or \$45 per pupil depending upon whether pupils in grades one through six or seven through twelve are involved, and the question which the dissenting opinion in the Appellate Division of the New York Supreme Court suggested and which was apparently adopted by the majority in the Court of Appeals, that in each case the question of the use of the funds by the schools could be tried to assure that none had been expended for religious purposes. Neither of those issues may be expected to develop additional issues of constitutional significance for review by this Court.

The second consideration as to finality also highlights an additional basis for the jurisdiction of this Court. A trial in each case, on the issues of how the funds expended for testing and record keeping had been used, to assure that none had been spent for religious purposes, would involve the Courts in the auditing of the expenditures and supervision over the nonpublic schools of funds sufficient to create an excessive entanglement between church and state, a constitutional violation over and above that created by the statute itself.

In *Levitt v. Committee for Public Education and Religious Liberty* (413 U.S. 472 [1973]), this Court held unconstitutional the parent statute of Chapter 996 which provided on a permanent basis the same aid provided for 6 months by Chapter 996. It is the position of appellant that this statute only revives that unconstitutional statute and is, therefore, itself in violation of the Establishment Clause.

## ARGUMENT

### POINT I

THIS COURT HAS JURISDICTION OF THIS APPEAL SINCE THE ORDER APPEALED FROM ITS FINAL IN EFFECT AND LEAVES NO ISSUE FOR DETERMINATION BY THE TRIAL COURT WHICH COULD ULTIMATELY BE REVIEWED BY THIS COURT. IN ADDITION, THE CARRYING OUT OF THIS DECISION OF THE NEW YORK COURT OF APPEALS WOULD INVOLVE THE COURT OF CLAIMS IN EXCESSIVE AND UNCONSTITUTIONAL ENTANGLEMENT BETWEEN CHURCH AND STATE.

A. The order appealed from is final in effect so far as issues subject to the appellate jurisdiction of this Court are concerned.

Although the order of the Court of Appeals remands the action to the New York State Court of Claims for further proceedings, those further proceedings will have no effect upon the issue presented here, the constitutionality of Chapter 996 of the New York Laws of 1972. That issue was finally determined by the Court of Appeals.

Jurisdiction of this Court on appeals from a State Court is prescribed by 28 U.S.C. § 1257(2), which provides that this Court may review final judgments or decrees, rendered by the highest Court of a state in which a decision can be had:

"By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

In the instant action, the highest Court of New York State has held Chapter 996 to be constitutional and reversed prior holdings of unconstitutionality. This appeal clearly draws in question the validity of a State statute under the Constitution of the United States; that is the only issue presented on this appeal.

Further proceedings in State Courts must be taken on the presumption that the statute is constitutional and no further State Court proceedings can question the validity of the statute under the First Amendment.

Consequently, the instant case falls within at least two of the criteria specified by this Court in its analysis of section 1257(2) in

*Cox Broadcasting Corp. v. Cohn* (420 U.S. 469, 476-487 [1975]), because "the federal issue is conclusive" (420 U.S. at 479) and because:

"the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings." (420 U.S. at 480.)

To all practical intents and purposes then, the decision of the Court of Appeals is final for the purposes of appeal to this Court and this Court, therefore, has jurisdiction of the appeal.

B. The carrying out of the decision of the New York Court of Appeals would require an in depth examination by the Court of Claims of the services for which reimbursement is made resulting in an excessive entanglement between church and state.

Chapter 138 of the New York Laws of 1970, the statute declared unconstitutional by the Court in *Levitt, supra*, provided for a reimbursement of \$27 per pupil in elementary grades and \$45 per pupil in higher grades to non-public schools as compensation for record keeping and testing services required by State law or regulation.

Holding the statute unconstitutional in *Levitt*, this Court held that teacher-prepared tests, as distinguished from State — prepared tests, were an integral part of the teaching process and could be used to further the religious purposes of the non-public schools. While the Court appeared to find no fault with compensation for the costs of administering State prepared tests, the Court found no basis upon which the lump sum payments could be judicially segregated to compensate for the ideologically neutral services, holding that segregation was a legislative, not a judicial function.

The New York State Legislature in enacting Chapter 996 of the Laws of 1972 made no such segregation, nor did it establish guidelines whereby the Court of Claims could segregate the funds provided in the 1972 act from the payments held invalid with respect to the 1970 acts. On the contrary, the Court of Claims is authorized to "hear, audit and determine" the claims of the non public schools.

The dissenting opinion in the Appellate Division, which by reason of its adoption by the majority in the Court of Appeals has

become the prevailing opinion, observed that the post audit to be performed in these cases by the Court of Claims "will necessarily establish whether or not the amounts claimed for mandated services constitute a furtherance of the religious purposes of the claimant." (Appendix to Juris. Statement, All).

That fact can only be established by an examination of the nature and use of all teacher prepared tests used in claimant schools in 1972. It will require a surveillance by the Court to determine that no compensation is rendered for testing services where the tests were used to teach religion or religious principles. This, we submit, is clearly excessive entanglement between church and state.

The opinion of this Court in *Walz v. Tax Commission of New York City* (397 U.S. 664 [1970]), while rendered in a case involving tax exemption of church-owned property and not on the issue of direct financial aid to sectarian institutions, sets forth certain considerations to be employed in testing whether particular legislation violates the First Amendment. The test, as phrased by Chief Justice BURGER, is two-pronged (669):

"Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so."

The Court's decision focuses on whether the statute fosters "excessive entanglement" between government and religious institutions. Such entanglement is variously characterized as "sponsorship", "interference", and a relationship generating "confrontation and conflicts". Most pertinent to this action, in discussing the alternatives of taxing or exempting church property, the Chief Justice observed (675):

"[T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for the enforcement of statutory or administrative standards \* \* \*."

That decision makes it clear that the test of a statute's effect is not whether the secular result is more important than the religious result, nor whether the activity aided is in form secular, but

whether the degree of entanglement required by the statute is likely to promote the substantive results against which the First Amendment guards.

Applying that decision, this Court in *Lemon v. Kurtzman* (*Lemon I*) (403 U.S. 602 [1971]) held invalid a Pennsylvania statute providing for payments to non-public schools of the costs of teaching certain secular subjects. The extensive auditing provisions, to insure that no State funds were used for religious purposes, this Court found to constitute excessive entanglement between Church and State.

*Lemon I* involved statutes of two states, Rhode Island and Pennsylvania, which provided subsidies for teachers in non-public schools and the statute of one State, Pennsylvania, which provided for the purchase of secular educational services from non-public schools by public school districts. This Court held all three statutes unconstitutional because they fostered an excessive entanglement between church and state in the efforts necessary to prevent compensation for sectarian education. In so holding, the Court's opinion discusses the nature of prohibited contacts (403 U.S. at 615):

"In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. Mr. Justice Harlan, in a separate opinion in *Walz, supra*, echoed the classic warning as to 'programs, whose very nature is apt to entangle the state in details of administration \* \* \*.' *Id.*, at 695."

With respect to the Rhode Island program, the Court observed that, as to certain schools, it was necessary to examine a school's records to determine how much of its expenditures are for secular activity and how much for religious purposes, just as in the instant case, the Court of Claims must examine the tests administered by the schools and their cost to determine how much is attributable to the furtherance of the religious purposes of the school. As to those examinations, this Court said (403 U.S., at 620):

"This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a

relationship pregnant with dangers of excessive government direction of church schools and hence of churches."

The same rationale clearly applies in the instant case. The examination by the Court of Claims into the nature of the services being compensated for, including the subject matter of tests administered by the schools, is "fraught with the sort of entanglement that the Constitution forbids."

The original 1970 statute provided only for lump sum per pupil payments which involved no such auditing function. The Court of Appeals, in adopting the dissenting opinion in the Appellate Division, had rejected a new element of unconstitutionality by providing for an audit by the Court of Claims into the uses of the money.

The constitutionality of that new element should be determined prior to the exercise of that auditing function by the Court since such pervasive "governmental power will ultimately intrude on religion" (403 U.S. at 620). For that reason too this Court has jurisdiction of this appeal.

## POINT II

AN AWARD TO APPELLEE OF MONEYS REPRESENTING PAYMENTS DUE UNDER CHAPTER 138 OF THE LAWS OF 1970, A STATUTE PREVIOUSLY HELD UNCONSTITUTIONAL, WOULD HAVE THE PRIMARY EFFECT OF SUPPORTING A RELIGIOUS INSTITUTION IN VIOLATION OF THE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES.

Chapter 996 of the Laws of 1972 initially confers jurisdiction on the Court of Claims to "hear, audit and determine" claims of non-public schools for reimbursement of funds expended by those schools in record keeping and testing as required by State law or regulation. However, those claims are specifically limited to unpaid sums for the 1971-72 school year; moneys which were payable pursuant to chapter 138 of the Laws of 1970. The projected awards by the Court of Claims are in substitution for moneys enjoined from payment upon a finding of the unconstitutionality of the underlying statute — chapter 138 of the Laws of 1970 *Levitt v. Committee for Public Education and Religious*

*Liberty*, 413 U.S. 472 [1973], affg. 342 F. Supp. 439).

The enabling act, pursuant to which the claim which is the subject of this action was filed, merely revived an unconstitutional statute and is subject to the same constitutional infirmities.

Appellee, Cathedral Academy, is uncontrovertably under the jurisdiction of the Roman Catholic Diocese of Albany. The corporate entity to which payments under chapter 138 were made was the Albany Diocesan School Board, Inc. The affidavit in support of claimant's motion for summary judgment was made by the Vice President of the Cathedral of the Immaculate Conception. The Court of Claims decided the case and the Appellate Division affirmed based upon the unquestioned and uncontroverted assumption that appellant is a sectarian school.

The issue here is, fundamentally, whether, regardless of the guise under which the taxing power is invoked, the State may constitutionally use that power to furnish direct financial assistance to non-public schools which are controlled in **whole** or in part by religious denominations or in which denominational doctrines are taught.

Every discussion on the impact of the First Amendment upon a state's taxing power begins with *Everson v. Board of Education* (330 U.S. 1 [1947]). It is, therefore, also necessary to begin our inquiry on that issue with an analysis of that case.

At issue in *Everson* were the provisions of a New Jersey statute permitting local school boards to provide transportation for students attending church schools. Mr. Justice BLACK, speaking for the majority of this Court, defined the scope of the Establishment Clause as follows (pp. 15-16):

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.*" (Emphasis added.)

The opinion further states (p. 16):

"New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church."

Fundamental to the concept of religious freedom, as envisaged by the Framers of the First Amendment, was the belief that it was destructive of personal freedom to compel any man to pay taxes for religious purposes. Indeed, the history of the struggle for religious freedom in America is in large measure the history of the struggle against taxation for religious purposes. As early as 1644, a tanner named Briscoe in Massachusetts Bay Colony had published a pamphlet against the then existent church tax, arguing that such a method of supporting religion was immoral and contrary to justice (Cobb, *The Rise of Religious Liberty in America*, p. 170 [1902]). As the Court said in *Everson* (330 U.S., p. 11):

"These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment. No one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty. But Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group."

The Court then referred to the struggle against the tax levy for religion in Virginia; Madison's *Memorial and Remonstrance*, which led to the success of that struggle; and Jefferson's Statute for Establishing Religious Liberty, which was a product of that controversy. It is significant that much of the *Memorial and*

*Remonstrance* is framed in terms of religious liberty. Indeed, its very opening invokes the freedom of religion clause of the Virginia Declaration of Rights, as does its close. It is significant, too, that defeat of the tax levy led immediately to the enactment of the State for Establishing Religious Liberty, whose principal provision is that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever. \* \* \*"

The Establishment Clause of the Federal Bill of Rights was based upon the awareness of the historical fact that governmentally established religions and religious persecution go hand in hand and on the belief that a union of government and religion tends to destroy government and degrade religion (*Engle v. Vitale*, 370 U.S. 421 [1962]).

While four Justices in *Everson* disagreed over the application of these principles to the facts of the case before them, it is important to observe that all of the dissenters agreed as to the principles therein defined. What is more, this definition of principle has been repeated and reaffirmed repeatedly since that decision (See, e.g., *Illinois ex rel. McCollum v. Board of Education of School District No. 71*, 333 U.S. 203 [1948]; *McGowan v. Maryland*, 366 U.S. 420 [1961]; *Torcaso v. Watkins*, 367 U.S. 488 [1961]; *Board of Education v. Allen*, 392 U.S. 236 [1968]).

When he came to the application of the principle to the New Jersey statute, Mr. Justice BLACK concluded (p. 18):

"The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."

The application of the *Everson* doctrine to the instant case is clear and unquestionable. Here the State *would* contribute money to the sectarian school; it *would* support them, even if only once, by the payment of funds which would have been paid in 1972 except for the Federal Court injunction. A tax would be raised for the support of such schools and thus, for the support of the religion they teach.

In *McCollum, supra*, this Court held it unconstitutional to allow the use of public school premises for sectarian teachings.

The Court repeated that: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion" (333 U.S., p. 210).

In *Zorach v. Clauson* (343 U.S. 306 [1952]), this Court upheld the constitutionality of a program of released time for religious education under which children would be released from public school for one hour a week to receive religious instruction in church schools, because no expenditure of public funds or use of public buildings was involved. The court said (at p. 314): "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education. \* \* \*"

In *Engle v. Vitale* (370 U.S. 421 [1962]), this Court, holding unconstitutional the practice of prayer recitation in the public schools, which had been prevalent almost since the founding of the public schools, stated (at p. 431) that when "the power, prestige and financial support of government is placed behind a particular religious belief," the Establishment Clause of the First Amendment is violated. The Court quoted from Madison's *Memorial and Remonstrance* (at p. 436), that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."

A further test as to the validity of statutory enactments relative to interaction between Church and State, was set forth by this Court in *Abington School District v. Schempp* (374 U.S. 203 [1963]), a case involving a State law requiring daily Bible reading in the schools, wherein the Court stated (p. 222):

"The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

While the *purpose* of the statute here in question might not be the advancement of religion, the *primary effect* of monetary aid to sectarian schools, particularly so long after the funds to be

reimbursed were spent, would be the advancement of the religious function of the schools and thus, such aid would be barred by the terms of the First Amendment. This Court's decision in *Abington* continued (pp. 216-217):

"\* \* \* this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another. Almost 20 years ago in *Everson, supra*, at 15, the Court said that '(n)either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.' And Mr. Justice Jackson, dissenting, agreed:

"There is no answer to the proposition \* \* \* that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. \* \* \* This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity.' *Id.*, at 26.

"Further, Mr. Justice Rutledge, joined by Justices Frankfurter, Jackson and Burton, declared:

"The [First] Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.' *Id.*, at 31-32.

"The same conclusion has been firmly maintained ever since that time, see *Illinois ex rel. McCollum, supra*, at pp. 210-211; *McGowan v. Maryland, supra*, at 442-443; *Torcaso v. Watkins, supra*, at 492-493, 495, and we reaffirm it now."

In the *Abington* case, in his concurring opinion, Mr. Justice DOUGLAS emphasized (374 U.S., at p. 229):

"The most effective way to establish any institution is to finance it, and this truth is reflected in the appeals by Church groups for public funds to finance their religious schools."

Mr. Justice CLARK's test, first set out in *Abington*, was amplified by the Justice himself in *Religion and the Law* (15 S.C.L. Rev. 855, 859 [1963]):

"The phrase 'respecting the establishment of religion' prohibits situations where the church and state are one; where the church may control the state and vice versa; and where there is some working arrangement between the two \* \* \* Finally, the term includes the furnishing of funds for facilities by the state where the purpose and primary effect is to advance religion."

But even if we consider the formula used in *Abington* independently of the language of *Everson*, the conclusion as to the statute here at issue must be the same as that reached on the basis of the criteria set forth in *Everson*. Furthermore, the primary effect of a state law which provides financial aid to sectarian institutions is to aid the institution and the denomination which controls it.

Prior to the enactment of chapter 138 of the Laws of 1970, the non-public schools were required to provide record keeping and examination services to the State at their own expense, and since the determination in *Levitt*, they have been required to do so again.\* Funds paid pursuant to chapter 138, the Courts held, compensated the schools for a portion of the costs of administering the teaching functions of the schools. This, Court in *Levitt* held to violate the Establishment Clause of the First Amendment.

\* By chapters 507 and 508 of the Laws of 1974, non-public schools are being reimbursed for the actual expenses of required record keeping and administration of State prepared and mandated examinations. These statutes were held unconstitutional by the United States District Court for the Southern District of New York in *Committee for Public Education and Religious Liberty v. Levitt* and are now the subject of an appeal to this Court which was docketed October 29, 1976.

Such aid shifts a portion of the cost of running such schools from the religious denomination which owns them to the State. Therefore, the effect of such legislation is to facilitate the maintenance of sectarian schools by religious groups. Since these schools are established to advance religion, the effect of state finance aid to sectarian institutions is advancement of religion. Hence, *Abington*, if anything, strengthens the conclusion that a law providing financial aid to sectarian is "an establishment of religion" in violation of the First Amendment.

Appellee in the instant case bases its allegations of validity of chapter 996 of the Laws of 1972 on the decision of this Court in *Lemon II* (*Lemon v. Kurtzman*, 411 U.S. 192 [1973]). The New York Court of Claims, however, clearly set out the distinguishing features between this case and that in *Lemon II*, distinctions which are persuasive as to a result of unconstitutionality in this case. The Trial Court here held:

"Despite the holding in *Levitt*, claimant urges that *Lemon II* stands for the proposition that, even though a state statute may have been struck down under the Establishment Clause, nevertheless, when a claimant relies thereon, prior to the finding of unconstitutionality, in performing certain services with the expectation of reimbursement, which is not forthcoming, then, in right, justice, law and equity claimant should be reimbursed. As applied to the facts of the instant claim we disagree because in *Lemon II* the Supreme Court, after remand, found that any payments there allowed 'will not be applied for any sectarian purposes' (see pp. 202, 203), whereas in *Levitt* the Court found that 'the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities' (see p. 480).

"In *Lemon II*, in affirming the judgment of the three-judge District Court of the Eastern District of Pennsylvania entered after remand, Mr. Chief Justice Burger, in an opinion joined in by three other justices, made a specific finding that the State funds there involved would not be applied for any sectarian purposes, stating on pages 202, 203:

" 'Yet even assuming a cognizable constitutional interest in barring any state payments, under the District Court holding, that interest is implicated only once under special circumstances that will not recur. There is no present risk of

significant intrusive administrative entanglement, since only a final post-audit remains and detailed state surveillance of the schools, is a thing of the past. At the same time, that very process of oversight — now an accomplished fact — assures that state funds will not be applied for any sectarian purposes.<sup>3</sup> Finally, as will appear, even this single proposed payment for services long since passing state scrutiny reflects no more than the schools' reliance on promised payment for expenses incurred by them prior to June 28, 1971.<sup>4</sup>

"The reimbursement in *Lemon II*, affirmed by the Supreme Court, was found allowable because of the very reason the statute was struck down, i.e., the excessive entanglement by the State of Pennsylvania. Such process of oversight by the State, in the form of auditing, assured that State funds would not be applied for any sectarian purposes. Hence, the Supreme Court reasoned that, even assuming a cognizable constitutional interest in barring any state payments under the Pennsylvania statute, any payments to the schools would not and could not be applied by them in aid of sectarian purposes. That essential assurance is lacking in Chapters 138 and 996."

<sup>3</sup> '3. See *Lemon I*, supra:

"If the government closed its eyes to the manner in which these grants are actually used it would be allowing public funds to promote sectarian education. If it did not close its eyes but undertook the surveillance needed, it would, I fear, intermeddle in parochial affairs in a way that would breed only rancor and dissension." 403 U.S., at 640, 29 L. Ed 2d 745 (concurring opinion of Douglas, J.).

"The Court thus creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught . . . and enforces it, it is then entangled in the "no entanglement" aspect of the Court's Establishment Clause jurisprudence." *id.*, at 668, 29 L. Ed 2d 783 (dissenting opinion of White, J.).

"Here, the "insoluble paradox" is avoided because the entangling supervision prerequisite to state aid has already been accomplished and need not enter into our present evaluation of the constitutional interests at stake in the proposed payment."

Rejecting the applicability of *Lemon II* to this case, the majority of the Appellate Division (in the opinion adopted by the dissenters in the Court of Appeals) held (Jurisdictional Statement, pp. A6-A9):

"In striking down the Pennsylvania statute in *Lemon I*, the court focused upon the fact that the requirement of ongoing scrutiny as above described fostered an 'excessive entanglement' between church schools and state. The validity of the payments themselves, on the facts there presented, was not determined — that issue did not arise until the question of reimbursement was raised in *Lemon II* (see 411 U.S. at 202). In allowing those payments to be made, the Supreme Court stated that reliance interests had significant weight in the shaping of an equitable remedy. However, those reliance interests were weighed not in a vacuum, but, rather, in the context of 'the remote possibility of constitutional harm \* \* \* (*Lemon II*, supra, 411 U.S. at 203). That remoteness was founded upon the fact that entanglements in the nature of inspection, audit, and the like had already occurred, wherefore 'payment \* \* \* will compel no further State oversight of the instructional processes \* \* \*. Moreover, and perhaps more significant to a consideration of the case at bar, 'that very process of oversight — now an accomplished fact — assures that state funds will not be applied for any sectarian purposes.' (*Lemon II*, supra, 411 U.S. at 202). In reaching this conclusion, the court took notice of the existence of an 'insoluble paradox' inherent in the fact that payments to religious schools could not be made without some assurance that they would be applied only to secular purposes, yet such assurances could not be provided without engaging in the forms of oversight constituting entanglements of a sort prohibited by *Lemon I*. In *Lemon II*, the 'insoluble paradox' was 'avoided because the entangling supervision prerequisite to state aid has already been accomplished and need not enter into [an] evaluation' of the payments to be made (*Lemon II*, supra, 411 U.S. at 203, n.3). In the case at bar, on the other hand, the paradox is squarely presented.

"We are of the view that the paradox cannot be resolved without sanctioning a violation of the religion clauses of the First Amendment, and therefore we affirm. The factor of greatest significance in leading us to this result is that in

*Levitt*, the payments themselves were held to be unconstitutional because of the inability to identify secular purposes to which they would be applied. Nor has any relationship been shown between the payment formula and such supposed secular purposes; as the court noted, '[e]xactly how the \$27 and \$45 figures were arrived at is somewhat unclear'. (*Levitt*, *supra*, 413 U.S. at 476, n. 4.) For all its well-argued efforts to bring this case within the ambit of *Lemon II*, appellant has failed to demonstrate how payments under chapter 996 of the Laws of 1972 would differ in substance or form, in quality or quantity, from prohibited payments under the invalidated Mandated Services Act.<sup>3</sup> Thus, if payments are to be made under chapter 996 pursuant to the same formula as had been in effect under the Mandated Services Act, a finding that such payments would be unconstitutional because not limited to identifiable secular purposes is inescapable. If, on the other hand, chapter 996 contemplates that appellant and other schools are to be reimbursed only for actual costs incurred in performing the mandated services, some process of audit, inspection and supervision, invalid under the standards set up in *Lemon I*, would now be required.<sup>4</sup> Because of this fundamental distinction — the

---

"3. In addition to the distinction based on the fact that the decision in *Lemon I* did not invalidate the payments per se under the Pennsylvania statute, it is also noteworthy that the Federal Court there undertook to fashion an equitable remedy by carving out an exception to the scope of the injunction. Here, the Federal court has not seen fit to do so; the injunction against payments stands, without limitation."

"4. Presiding Justice Herlihy, arguing in his dissent that reimbursement should be permitted because of the reliance by the schools upon the expectation of payment, is of the view that reimbursement should be in such amount as would be determined by the trial court to equal the expenditures incurred in performing the services. This amount, as previously suggested, may be markedly different from the amount which appellant and others might have expected under the Mandated Services Act formula. We are unable to agree with the contention that because appellant and others similarly situated relied upon being paid in an amount determined according to that formula, they should be entitled to reimbursement in an amount which bears no demonstrated relationship to the payments which would have been forthcoming under that formula."

lack of an already-completed 'entangling' process — the constitutional interests at stake in the present case are weightier than those in *Lemon II*, and cannot be overcome by appellant's reliance arguments.

"Appellant argues, however, that those constitutional interests, just as the interests in *Lemon II*, will be 'implicated only once under special circumstances that will not recur' (*Lemon II*, 411 U.S. at 202). In *Lemon II*, however, a constitutional interest arising from the payments was assumed for the purpose of discussion, since the constitutionality of the statute in *Lemon I* had not turned upon the invalidity of the payments per se, whereas in the present case, the constitutional interest is more tangible because of the invalidation of the payments under *Levitt*. Moreover, in this case, a further constitutional interest will be implicated because of the need for State oversight in the form, at the very least, of an audit process."

The Court of Claims, the majority in the Appellate Division and, *per force*, the dissenters in the Court of Appeals, correctly refused to apply *Lemon II* to the statute at issue in the instant case. Whereas in *Lemon II* the auditing function had been the unconstitutional element which had terminated prior to the claim for payment at issue there, in the instant case it was the purpose for which payments were made which rendered chapter 138 unconstitutional and the payments under chapter 996 would be made for the same unconstitutional purpose. The fact that only one payment is involved is immaterial. A statute cannot be "a little bit unconstitutional".

**CONCLUSION**

IT IS RESPECTFULLY SUBMITTED THAT THE ORDER BELOW SHOULD BE REVERSED AND THAT JUDGMENT SHOULD BE ENTERED HOLDING CHAPTER 996 OF THE NEW YORK LAWS OF 1972 TO BE UNCONSTITUTIONAL AND INVALID.

Dated: April 6, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
Attorney for Appellant  
The Capitol  
Albany, New York 12224  
Telephone: (518) 474-7138

RUTH KESSLER TOCH  
Solicitor General

JEAN M. COON  
Assistant Solicitor General

KENNETH CONNOLLY  
Assistant Attorney General

of Counsel

**APPENDIX — Chapter 996 of the 1972 Laws of New York.**

**Claims Against State — Nonprofit Schools  
Chapter 996**

An Act to confer jurisdiction upon the court of claims to hear, audit and determine the claim or claims of nonprofit schools, other than public schools for expenses incurred in rendering certain mandated services.

Approved and effective June 8, 1972.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Jurisdiction is hereby conferred upon the court of claims to hear, audit and determine the claim or claims of nonprofit schools in the state, other than public schools, against the state for reimbursement of the funds expended by them in rendering services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports required by law or regulation. The base of said claim or claims is that the State of New York represented to said schools that they would be reimbursed for such expenses incurred after July first, nineteen hundred seventy; that the said State knew that said schools were relying on said representation; that said representation was an effective cause of said expenses by said schools; and that without any fault on the part of said schools complete reimbursement has not been paid to them, though due and owing. As such, said claim or claims are founded in right and justice, or in law or equity.

§2. In hearing, auditing and determining such claim or claims, the court of claims is hereby authorized to consider, inter alia:

(a) That prior to July first, nineteen hundred seventy, said nonprofit schools, rendered services for examination and

**APPENDIX**

*APPENDIX — Chapter 996 of the 1972 Laws of New York.*

inspection in connection with administering, grading and the compiling and reporting of the results of tests and examination, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualification and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation;

(b) That by a chapter of the laws of nineteen hundred seventy, it was determined and declared as a matter of legislative finding:

"That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.

And that nonpublic schools of the state are responsible for the education of more than eight hundred fifty thousand pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools which these children attend in fulfillment of the above state purposes are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonable assisting such services."

(c) That in furtherance of said policy, appropriations were made to the education department to enable the department to

APPENDIX

*APPENDIX — Chapter 996 of the 1972 Laws of New York.*

reimburse such schools for the rendering of such services;

(d) Based on the representation of the State that reimbursement would be made for such services, such schools already in fiscal crisis, by budgetary allocations and other methods made available the necessary personnel to perform such services;

(e) That the federal courts, by various orders enjoined payments to such schools. As a result reimbursement for the full period July first, nineteen hundred seventy-one to June thirtieth, nineteen hundred seventy-two, has not been made to such schools, although all such services were or will be duly performed;

(f) That such schools during such period did incur expenses in providing the mandated services in reliance upon said representation of reimbursement;

(g) That but for this claim or claims complete reimbursement to such schools would not be made and such schools are thus without legal right to recover for said expenses;

(h) That the legislature recognizes a moral obligation to provide a remedy whereby such schools may recover the complete amount of expenses incurred by them prior to June thirtieth, nineteen hundred seventy-two in reliance on the said representation.

§3. If the court finds that such claim or claims or any of them were founded in right and justice or in law and equity against the state of New York, and are in right and justice presently payable thereby, the state shall be deemed to have been liable therefor and such claim or claims shall constitute legal and valid claims against the state, and the court may award and render judgments for the claimants as shall be just and equitable, notwithstanding the lapse of time since any such claim or claims or any parts thereof accrued, or the failure to do any act in relation to the presentation of such claims or any of them within the time prescribed by law, but no award shall be made or judgment rendered hereunder against the state unless such claim shall be

APPENDIX

*APPENDIX — Chapter 996 of the 1972 Laws of New York.*

filed with the court of claims within ninety days from the passage of this act, nor if such claim, as between citizens of the state, would be barred by lapse of time.

§4. This act shall take effect immediately.

MAY 23 1977

MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**

October Term, 1976

No. 76-616

THE STATE OF NEW YORK,

*Appellant,*

—against—

CATHEDRAL ACADEMY,

*Appellee.*

ON APPEAL FROM THE COURT OF APPEALS OF  
THE STATE OF NEW YORK

---

---

**BRIEF FOR APPELLEE**

---

---

RICHARD E. NOLAN

*Attorney for Appellee*

1 Chase Manhattan Plaza

New York, New York 10005

Tel.: (212) 422-3400

THOMAS J. AQUILINO, JR.

LOWELL GORDON HARRISS

DAVIS POLK &amp; WARDWELL

*Of Counsel*

## TABLE OF CONTENTS

	PAGE
Opinions Below .....	1
Constitutional Provision and Statute Involved .....	2
Question Presented .....	2
Statement of the Case .....	2
The Mandated Services Act .....	3
Chapter 996 .....	5
Prior Proceedings .....	7
Jurisdiction .....	11
Summary of Argument .....	12
<b>ARGUMENT</b>	
POINT I—CHAPTER 996 IS CONSTITUTIONALLY VALID UNDER THIS COURT'S DECISION IN LEMON II .....	13
POINT II—THE CARRYING OUT OF THE COURT OF APPEALS' JUDGMENT WILL NOT RESULT IN ANY ENTANGLEMENT BETWEEN CHURCH AND STATE .....	24
POINT III—APPELLANT'S ARGUMENT THAT REIM- BURSEMENT UNDER CHAPTER 996 WILL FREE AP- PELLEE TO SPEND OTHER FUNDS FOR RELIGIOUS PURPOSES IS IRRELEVANT .....	26
Conclusion .....	29
APPENDIX .....	A-1

## TABLE OF AUTHORITIES

	PAGE
<i>Cases</i>	
<i>Americans United for Separation of Church &amp; State v. Benton</i> , 413 F.Supp. 955 (S.D. Iowa 1976) .....	19
<i>Americans United for Separation of Church &amp; State v. Board of Education</i> , 369 F.Supp. 1059 (E.D.Ky. 1974) .....	20
<i>Americans United for Separation of Church &amp; State v. Paire</i> , 348 F.Supp. 506 (D.N.H. 1972), <i>vacated and remanded</i> , 475 F.2d 462 (1st Cir. 1973) .....	19
<i>Americans United for Separation of Church &amp; State v. Paire</i> , 359 F.Supp. 505 (D.N.H. 1973) .....	19
<i>Board of Education v. Allen</i> , 392 U.S. 236 (1968) .....	26
<i>Committee for Public Education &amp; Religious Liberty v. Rockefeller</i> , 322 F.Supp. 678 (S.D.N.Y. 1971) .....	4
<i>Committee for Public Education &amp; Religious Liberty v. Levitt</i> , 342 F.Supp. 439 (S.D.N.Y. 1972) .....	4, 21
<i>Committee for Public Education &amp; Religious Liberty v. Nyquist</i> , 413 U.S. 756 (1973) .....	17, 21, 26
<i>Cox Broadcasting Corp. v. Cohn</i> , 420 U.S. 469 (1975) .....	11
<i>Hunt v. McNair</i> , 413 U.S. 734 (1973) .....	27
<i>Lemon v. Kurtzman</i> , 310 F.Supp. 35 (E.D.Pa. 1969) .....	15
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971) .....	8, 15, 17, 22, 24, 25
<i>Lemon v. Kurtzman</i> , 348 F.Supp. 300 (E.D.Pa. 1972) .....	15, 16
<i>Lemon v. Kurtzman</i> , 411 U.S. 192 (1973) .....	passim
<i>Levitt v. Committee for Public Education &amp; Religious Liberty</i> , 413 U.S. 472 (1973) .....	3, 5, 8, 20, 21, 26

	PAGE
<i>Roemer v. Board of Public Works of Maryland</i> , 387 F.Supp. 1282 (D.Md. 1974) .....	20
<i>Roemer v. Board of Public Works of Maryland</i> , 426 U.S. 736 (1976) .....	20, 27
<i>Sloan v. Lemon</i> , 413 U.S. 825 (1973) .....	21
<i>Walz v. Tax Comm'n of the City of New York</i> , 397 U.S. 664 (1970) .....	25
<i>Constitution</i>	
U.S. Const. amend. 1 .....	2-4, 12-17, 20, 28
<i>Statutes</i>	
28 U.S.C. §1257 .....	11
28 U.S.C. §2281 .....	4
28 U.S.C. §2284 .....	4
[1970] Laws of N.Y. ch. 138 .....	3-5, 8, 9, 20-23, 28
[1972] Laws of N.Y. ch. 996 .....	2, 3, 5-7, 12, 13, 22-24, 26, 27
[1968] Laws of Pa. No. 109, Pa. Stat. tit. 24, §§5601-09 .....	14, 18
<i>Other</i>	
NYS Educ. Dep't Information Center on Educ., Non-public School Enrollment and Staff New York State 1975-76 .....	26

IN THE  
**Supreme Court of the United States**

October Term, 1976

No. 76-616

---

THE STATE OF NEW YORK,

*Appellant,*

—against—

CATHEDRAL ACADEMY,

*Appellee.*

---

ON APPEAL FROM THE COURT OF APPEALS OF  
THE STATE OF NEW YORK

---

**BRIEF FOR APPELLEE**

---

**Opinions Below**

The memorandum decision of the Court of Appeals<sup>1</sup> is reported at 39 N.Y.2d 1021, 387 N.Y.S.2d 246, 355 N.E.2d 300. The dissenting opinion in the Appellate Division<sup>2</sup> upon which appellee's claim was ordered reinstated is reported at 47 App.Div.2d 396-400, 366 N.Y.S.2d 905-08 (3d Dep't 1975).

---

<sup>1</sup> Appendix A to appellant's Statement as to Jurisdiction [hereinafter referred to as "JS"].

<sup>2</sup> JS Appendix B, pp. A10 to A16. Another dissenting opinion in the Appellate Division, which the Court of Appeals did not adopt, is reported at 47 App.Div.2d 400-02, 366 N.Y.S.2d 909-10 (3d Dep't 1975).

### Constitutional Provision and Statute Involved

The First Amendment reads, in pertinent part, as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

The statute involved is Chapter 996 of the 1972 Laws of New York, entitled "An Act to confer jurisdiction upon the court of claims to hear, audit and determine the claim or claims of nonprofit schools, other than public schools for expenses incurred in rendering certain mandated services"<sup>a</sup> and discussed below at pages 5-7.

### Question Presented

Whether New York may, under *Lemon v. Kurtzman*, 411 U.S. 192 (1973), provide for the equitable reimbursement of nonpublic schools for the cost of services rendered in reliance upon a prior statute authorizing ultimate payment by the State and which services were planned and budgeted for and in part rendered before a District Court decision, later affirmed by this Court, that the prior statute was unconstitutional.

### Statement of the Case

Chapter 996 was enacted to correct an inequitable situation facing nonpublic schools in New York State which re-

<sup>a</sup> The full text of the statute [hereinafter referred to as "Chapter 996"] is set forth for the Court's convenience in the appendix to this brief, as well as at pages 58-61 of the Appendix.

sulted from the coincidental timing of a decision of the United States District Court for the Southern District of New York, invalidating, on First Amendment grounds, the Mandated Services Act.<sup>4</sup> Pursuant to Chapter 996, appellee filed a claim for \$7,347.29 against the State of New York for reimbursement of monies budgeted for and expended during the second semester of the 1971-1972 school year in connection with various record-keeping and testing services, payment of which would have been made but for the District Court's intervening decision and injunction.

### The Mandated Services Act

In the Mandated Services Act, the Legislature had declared that the State had the "duty and authority to provide the means to assure, through examination and inspection . . . that all of the young people of the state, regardless of the school in which they [we]re enrolled, [we]re attending upon instruction as required by the education law and [we]re maintaining levels of achievement". [1970] Laws of N.Y. ch. 138, §1. Section 2 provided that, for school years beginning after July 1, 1970, qualifying nonpublic schools such as appellee would be reimbursed on an average daily attendance basis for the expenses incurred in providing various testing and record-keeping services which these schools were required by state law to perform. Section 5 provided that the schools would be reimbursed each year in two installments, half of such expenses to be reimbursed between January 15 and March 15, with the balance to be paid to the schools between April 15 and June 15.

<sup>4</sup> [1970] Laws of N.Y. ch. 138; Appendix, pp. 62-65, held unconstitutional by the District Court on April 27, 1972, which decision was thereafter affirmed by this Court in *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472 (1973).

On June 30, 1970, an action was commenced in the District Court, challenging the Mandated Services Act as violative of the Establishment and Free Exercise Clauses of the First Amendment and seeking a permanent injunction against its enforcement. A number of nonpublic schools, including appellee, were permitted to intervene as defendants. The plaintiffs did not move, however, for a temporary restraining order or preliminary injunction, as the District Court noted on January 28, 1971 in granting their motion to convene a three-judge District Court pursuant to then applicable 28 U.S.C. §§2281, 2284. *See Committee for Public Education & Religious Liberty v. Rockefeller*, 322 F.Supp. 678, 681 n.4 (S.D.N.Y. 1971).

A hearing before the three-judge District Court was scheduled for April 8, 1971, but it was not held, and there were no proceedings before the Court until more than a year later. The case was then briefed and argued on April 11, 1972, at which time the Court orally entered a temporary restraining order against the payments which were scheduled to be made on or after April 15th. On April 27, 1972, the Court, by a two-to-one majority, held the Mandated Services Act unconstitutional as contravening the Establishment Clause. *See Committee for Public Education & Religious Liberty v. Levitt*, 342 F.Supp. 439 (S.D.N.Y. 1972). Final judgment, enjoining the State from reimbursing the nonpublic schools for expenses incurred during the spring 1972 semester, was entered on June 1, 1972 when the 1971-1972 school year was virtually at an end.

The defendants, including appellee, appealed to this Court, which noted probable jurisdiction on November 6, 1972,<sup>8</sup> heard oral argument on March 19, 1973 and, on June

<sup>8</sup> 409 U.S. 977.

25, 1973, affirmed over a dissent the judgment of the District Court. *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472.

During the approximately 22-month period between commencement of the action and determination by the District Court that the Mandated Services Act was unconstitutional, appellee, as well as other nonpublic schools, had filed claims for reimbursement of the costs of rendering the mandated services for the school year 1970-1971 and received reimbursement therefor in two payments during 1971 pursuant to Section 5 of the Act. In budgeting and otherwise planning for the 1971-1972 school year, appellee relied upon the eventual receipt of reimbursement for the expenses of rendering the mandated services<sup>9</sup> and filed a claim for reimbursement for that year. In January 1972, appellee received from the State \$7,347.28 in reimbursement for the first half of the 1971-1972 school year. Appellee expected to receive, and relied upon receiving, a second installment for providing the mandated services during the second half of that school year. However, this payment was never made because of the District Court's oral restraining order of April 11, 1972, decision of April 27th and injunction of June 1, 1972.

#### Chapter 996

The New York Legislature enacted Chapter 996 for the specific, but limited, purpose of correcting the inequitable situation in which nonpublic schools such as appellee had

<sup>9</sup> Reliance by appellee was specifically found by the Court of Claims. *See infra*, p. 7. The dissenting opinion in the Appellate Division adopted by the Court of Appeals reflects acceptance of this finding. *See generally infra*, pp. 8-10.

been placed due to the timing of the District Court's decision. This statute, which was enacted over a year before this Court's ultimate decision in *Levitt*, was designed to do equity to those nonpublic schools which had relied in budgeting and planning for the 1971-1972 school year upon receiving reimbursement for the total cost of rendering services mandated by the State, but which were prevented from receiving the second half of the reimbursement which, but for the District Court's oral restraining order on April 11, 1972 and decision on April 27, 1972, would have been paid during the period April 15, 1972—June 15, 1972.

Section 1 of Chapter 996 confers jurisdiction on the New York Court of Claims "to hear, audit and determine" claims of nonpublic schools such as appellee

against the state for reimbursement of the funds expended by them in rendering services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports required by law or regulation.

The core of the statute is the recognition that nonpublic schools relied in budgeting for the 1971-1972 school year on receiving reimbursement for all of the expenses incurred during that year in providing the services mandated by the State. Section 2 sets forth the considerations underlying Chapter 996, including the facts that the schools had made personnel available to perform the mandated services,

that they budgeted for and relied upon being reimbursed and that the Legislature recognized "a moral obligation to provide a remedy".

#### *Prior Proceedings*

On September 6, 1972, appellee filed its claim in the Court of Claims for \$7,347.29 pursuant to Chapter 996. On November 20, 1973, appellee filed a motion for summary judgment,<sup>7</sup> and the State cross-moved to dismiss the claim.

The Court of Claims found as a matter of fact

that the claimant was one of the schools included within the provisions of Chapter 138 and in accordance therewith made application for reimbursement for services rendered in the school year 1970-1971 and was reimbursed by the State for that school year in two equal payments; *that claimant budgeted for, relied upon and filed a similar application on or about November 5, 1971 for reimbursement for the school year 1971-1972 and the State reimbursed the claimant in January of 1972 for the first semester; and that the claimant rendered the required services for the remaining semester of the 1971-1972 school year and has not been reimbursed therefor.*<sup>8</sup>

Nevertheless, the Court of Claims dismissed appellee's claim on the ground that the Establishment Clause rendered Chapter 996 unconstitutional. *Cathedral Academy v. State of New York*, 77 Misc.2d 977, 985, 354 N.Y.S.2d 370, 378-79, (N.Y.Ct.Cl. 1974); Appendix, p. 56.

<sup>7</sup> See Appendix, pp. 2-14.

<sup>8</sup> *Cathedral Academy v. State of New York*, 77 Misc.2d 977, 978, 354 N.Y.S.2d 370, 372 (N.Y.Ct.Cl. 1974); Appendix, p. 46 (emphasis added).

Appellee's position was that, as a matter of federal constitutional law under *Lemon v. Kurtzman*, 411 U.S. 192 (1973),<sup>9</sup> discussed below at pages 13-24, a state is not prohibited from reimbursing nonpublic schools for expenses incurred in good faith reliance on a statute which at the time of enactment was not clearly unconstitutional, pending the resolution of litigation concerning the constitutionality of the statute. However, the Court of Claims held that, because this Court had declared the Mandated Services Act unconstitutional in *Levitt*, the granting of appellee's claim under Chapter 996 "would have the effect of resurrecting Chapter 138 which the Supreme Court declared unconstitutional". 77 Misc.2d at 983, 354 N.Y.S.2d at 376; Appendix, p. 53.

The Appellate Division, by a 3-2 vote, affirmed the judgment of the Court of Claims. *Cathedral Academy v. State of New York*, 47 App.Div.2d 390, 366 N.Y.S.2d 900 (3d Dep't 1975); JS Appendix B. Presiding Justice Herlihy dissented on the ground that this case presented substantially the same situation as in *Lemon II*:

Pursuant to chapter 996 . . . , there is to be a post-audit to determine whether or not the mandated services had in fact been performed by the claimant. While it is true that in *Lemon II* there had presumably been active supervision of the affairs of the school so as to insure that the acts for which reimbursement was to be made were not at least directly for religious purposes, the postaudit, which in this case is to be per-

<sup>9</sup> For the sake of clarity, this decision will be referred to hereinafter as "*Lemon II*", and this Court's prior decision, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), holding the underlying Pennsylvania statute unconstitutional on First Amendment grounds, will be referred to as "*Lemon I*".

formed by the Court of Claims, will necessarily establish whether or not the amounts claimed for mandated services constitute a furtherance of the religious purposes of the claimant . . . . As in the case of *Lemon II*, the single proposed payment for services rendered during the period of the presumed constitutionality of the former Mandated Services Act reflects no more than the school's reliance upon the promise of payment for their continuance to exist as institutions of education and providing a level of education required by the State. Indeed, the majority recognize that in *Lemon II* "a constitutional interest arising from the payments was assumed for the purpose of discussion" and yet would undermine the constitutional sanctioning of a one-time payment where there had been reliance upon a presumably constitutional enactment. The failings of the Mandated Services Act and the enactments of Pennsylvania and Rhode Island, while distinguishable for purposes of understanding what will not be permitted in regard to State enactments which provide aid to religious institutions, have no immediately perceivable impact upon the consideration of whether or not a subsequent payment may be made for reliance where the statutes brought under constitutional attack are not upon their face patently an abridgement of the Constitution. The Legislature recognized a moral obligation to reimburse the schools for monies already budgeted and expended. 47 App.Div.2d at 396-97, 366 N.Y.S.2d at 905-06; JS Appendix B, pp. A11-A12 (footnote omitted; emphasis in original).

He found that, far from "resurrecting" the Mandated Services Act,

the actual effect of chapter 996 of the Laws of 1972 is to close out the former Mandated Services Act and recognize its unconstitutionality instead of attempting to resurrect the same. In any event, Mandated Services Act . . . and chapter 996 of the Laws of 1972 are readily distinguishable.<sup>10</sup>

Further:

... [I]t is readily apparent that it was never the intent of the Legislature that any of its funds were to be allowed for the furtherance of religious purposes. In this regard, the audit of the claims by the Court of Claims must serve the same purpose as the final post audit which was referred to in *Lemon II* . . . . Accordingly, the burden will be upon the claimant to prove that the items of its claim are in fact solely for mandated services and the burden will be upon the Court of Claims to make appropriate findings in regard thereto. 47 App.Div.2d at 399-400, 366 N.Y.S.2d at 908; JS Appendix B, p. A16.

On July 13, 1976, after the case had been fully briefed and argued, the New York Court of Appeals, by a 4-to-3 majority, rendered the following decision:

Order reversed, with costs, and the claim reinstated on the dissenting opinion by then Presiding Justice J. Clarence Herlihy at the Appellate Division (47 AD2d 390, 396).<sup>11</sup>

<sup>10</sup> 47 App.Div.2d at 398, 366 N.Y.S.2d at 907; JS Appendix B, p. A13. The other dissenting opinion concluded as follows:

The instant case comes directly within *Lemon II*. The interests of fairness and justice dictate upholding a one-time reimbursement for past services authorized by this statute. 47 App.Div.2d at 401-02, 366 N.Y.S.2d at 910.

<sup>11</sup> JS Appendix A. The dissenting judges voted to affirm on the basis of the majority opinion at the Appellate Division.

The State appeals to this Court from this decision.

### *Jurisdiction*

On February 22, 1977, this Court postponed "[f]urther consideration of the question of jurisdiction . . . to the hearing of the case on the merits."

In our Motion to Dismiss or Affirm dated January 12, 1977, we noted that appellant invokes the jurisdiction of this Court under 28 U.S.C. §1257(2), which provides that this Court may review final judgments or decrees rendered by the highest court of a state in which a decision could be had as follows:

... By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

We pointed out that, under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-87 (1975), the judgment appealed from is final for purposes of this Court's review of the question presented. We remain of this opinion, for the reasons stated at pages 10-11 of that motion.

Appellant, while invoking this Court's jurisdiction, argues inconsistently at page 14 of its brief that, in carrying out the decision of the Court of Appeals, the Court of Claims will be required to "segregate" constitutionally reimbursable from non-reimbursable mandated services and that this will result in excessive entanglement between church and state. This is, we submit, incorrect for the reasons set forth below at pages 24-25. We consider that

there can be no excessive (or indeed any) entanglement between church and state in an audit by the Court of Claims of services which were performed approximately five years ago. In addition, neither Chapter 996 nor Presiding Justice Herlihy's opinion require any such "segregation", simply that the claimant prove "that the items of its claim are in fact solely for mandated [as opposed to discretionary] services", to quote from the salient section of the opinion.<sup>12</sup> In pursuing its present "entanglement" argument, appellant necessarily but incorrectly undermines its stated position with regard to the finality, for federal constitutional purposes, of the judgment appealed from.

### Summary of Argument

This appeal does not present any substantial federal question. The New York Legislature simply sought to remedy an inequitable situation which arose at the end of the 1971-1972 school year. The correctness and fairness of this type of limited remedial legislative action has been upheld by this Court in *Lemon II*, which involved facts and circumstances substantially similar to those at bar.

Appellant's claim at page 24 of its brief that any direct payment to religiously-affiliated schools "shifts a portion of the cost of running such schools . . . to the State" and is therefore violative of the Establishment Clause has been consistently rejected by this Court and, under the unusual circumstances presented by this case of good faith reliance on a presumptively valid statute, should be rejected for the reasons set forth hereinafter.

<sup>12</sup> *Supra*, p. 10.

Appellant's other claim that the carrying out of the Court of Appeals' decision would involve the Court of Claims "in excessive and unconstitutional entanglement between church and state"<sup>13</sup> cannot withstand analysis. The audit by the Court of Claims would not involve or have any conceivable effect on the current curriculum content or activities of the religiously-affiliated schools and would not involve any state judge or employee in such matters. It would involve simply a judicial inquiry, for purposes of determining the propriety of payment, into the services performed five years ago by the schools in the spring 1972 semester. This fact plus the fact that Chapter 996 provides for a one-time, rather than a continuing, reimbursement compels the conclusion that there cannot be any "excessive" or "continuing surveillance" entanglement between church and state of the type which this Court has heretofore required for invalidation on Establishment Clause grounds.

## ARGUMENT

### POINT I

#### CHAPTER 996 IS CONSTITUTIONAL UNDER THIS COURT'S DECISION IN *LEMON II*

The basic question on this appeal is the application of the facts of this case to the constitutional principles enunciated in *Lemon II*. The opinion in the Appellate Division, which formed the basis for the decision of the Court of Appeals upholding Chapter 996, found the facts herein to be substantially similar to those in *Lemon II* and within the flexible equitable principles which this Court set forth

<sup>13</sup> Brief for Appellant, pp. 14-17.

in that case. Since the Court of Appeals correctly applied *Lemon II*, and the decision below does not conflict with other decisions of this Court or other courts, and since the question presented involves only the application of undisputed facts to settled principles of federal law, no substantial federal question is presented.

In *Lemon II*, this Court held that the Establishment Clause does not prohibit a state from paying funds on a limited, one-time basis to nonpublic schools which had relied in good faith upon receipt of such funds pursuant to a state statute which was subsequently held to be unconstitutional, but as to which there had been a reasonable basis for presuming the statute to be valid.

The *Lemon* case arose out of Pennsylvania's enactment in 1968 of the Nonpublic Elementary and Secondary Education Act<sup>14</sup> which authorized reimbursement of nonpublic schools for the salaries of teachers of mathematics, modern foreign languages, physical science and physical education. The nonpublic schools were reimbursed "in four equal installments payable on the first day of September, December, March and June of the school term following the school term in which the secular educational service was rendered". Act 109, §7(a), Pa. Stat. tit. 24, §5607(a). In January 1969, Pennsylvania entered into contracts with nonpublic schools to purchase services for the 1968-1969 school year.

In June 1969, an action was brought, seeking declaratory and permanent injunctive relief against enforcement of Act 109. The plaintiffs filed, but subsequently abandoned, a motion for a preliminary injunction. On November 29,

<sup>14</sup> [1968] Laws of Pa. No. 109, Pa. Stat. tit. 24 §§5601-09 [hereinafter "Act 109"].

1969, a three-judge District Court granted a motion to dismiss the complaint. *Lemon v. Kurtzman*, 310 F.Supp. 35 (E.D. Pa. 1969). The plaintiffs appealed to this Court, which ultimately heard oral argument on March 3, 1971. On June 28, 1971, the Court, by a divided vote, declared the statute violative of the Establishment Clause on the ground that the state was constitutionally compelled to assure that the payments were not being used for religious indoctrination and that the ongoing surveillance necessary to accomplish this result created an excessive entanglement between church schools and the state. *Lemon I*, 403 U.S. 602 (1971).

The case was thereupon remanded to the District Court, which in December 1971 entered an order enjoining the defendants "from making payments for services performed or costs incurred for any period subsequent to June 28, 1971". *Lemon v. Kurtzman*, 348 F.Supp. 300, 301 n.1 (E.D. Pa. 1972) (emphasis added). Because payments for services rendered during the 1970-1971 school year were to be made in September and December of 1971, the effect of the order was to permit the state to reimburse nonpublic schools for the second semester of the 1970-1971 school year in December 1971, a date well after this Court had held the underlying statute to be unconstitutional.

The plaintiffs argued in the District Court that no payments could be made subsequent to the date of this Court's decision in June 1971. The three-judge District Court unanimously rejected this argument, finding no constitutional impediment to reimbursement after the statute had been held unconstitutional for services rendered prior to that determination. The Court stressed the equitable considerations arising from the nonpublic schools' "reliance" on re-

imbursement for the entire 1970-1971 school year by "adjust[ment of] their budgets accordingly and perform[ance of] the services required by them." 348 F.Supp. at 304.

The plaintiffs again appealed to this Court, which in *Lemon II* affirmed the District Court's judgment. The Court rejected, as a principle of constitutional law, the argument that payments subsequent to a declaration of unconstitutionality of an underlying statute are invalid *per se* under the Establishment Clause, but rather viewed the matter as the "process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old." 411 U.S. at 198. This process is, the Court explained, equitable in nature:

In shaping equity decrees, the trial court is vested with broad discretionary power . . . . Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable. "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private need." . . .

In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots. 411 U.S. at 200, 201 (citations and footnote omitted).

This Court thus enunciated a test of balancing "constitutional" and "reliance" interests in determining whether reimbursement is permissible after a declaration of invalidity for services rendered in good faith prior to that

judicial declaration.<sup>15</sup> As for the constitutional interests, the Court, after noting that "[t]he constitutional fulcrum of *Lemon I* was the excessive entanglement of church and state", observed that the one-time payment of \$24,000,000 to nonpublic schools "will not substantially undermine the constitutional interests at stake in *Lemon I*." 411 U.S. at 201. This Court noted problems having constitutional "overtones", but held that they were "minimal" or outweighed by "reliance" considerations. Rejecting the contention that the remaining final audit would engender excessive entanglement, the Court observed:

... [T]here is the question of impinging on the Religion Clauses from the fact of *any* payment that provides any state assistance or aid to sectarian schools—the issue we did not reach in *Lemon I*. Yet even assuming a cognizable constitutional interest in barring any state payments, under the District Court holding that interest is implicated only once under special circumstances that will not recur. There is not present risk of significant intrusive administrative entanglement, since only a final post-audit remains and detailed state surveillance of the schools is a thing of the past. At the same time, that very process of oversight—now an accomplished fact—assures that state funds will not be applied for any sectarian purposes. Finally, as will appear, even this single proposed payment for

<sup>15</sup> Contrary to appellant's argument at Point II of its brief, *Lemon II* does not require that courts apply to a case involving final equitable reimbursement the same three constitutional tests [e.g., *Lemon I*, 403 U.S. at 612-13; *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973)] which are applied in evaluating the validity of original legislation. Rather, *Lemon II* involved a balancing of considerations relating to justifiable reliance by the schools and those relating to the nature and degree of possible injury to Establishment Clause values.

services long since passing state scrutiny reflects no more than the schools' reliance on promised payment for expenses incurred by them prior to June 28, 1971. 411 U.S. at 202-03 (footnote omitted; emphasis in original).

This Court, in applying the balancing test, then considered the "reliance" interest involved:

Offsetting the remote possibility of constitutional harm from allowing the State to keep its bargain are the expenses incurred by the schools in reliance on the state statute inviting the contracts made and authorizing reimbursement for past services performed by the schools. 411 U.S. at 203 (footnote omitted).

The Court found there was sufficient evidence in the record of such reliance and emphasized that:

The significance of appellee schools' reliance is reinforced by the fact that appellants' tactical choice not to press for interim injunctive suspension of payments or contracts during the pendency of the *Lemon I* litigation may well have encouraged the appellee schools to incur detriments in reliance upon reimbursement by the State under Act 109. 411 U.S. at 204.

With respect to the issue of reliance, the plaintiffs argued that the nonpublic schools should not have relied on reimbursement because of the "constitutional cloud" over the statute and because the constitutionality of Act 109 had not been finally adjudicated when the contracts for the 1970-1971 school year were made. This Court held that the unconstitutionality of Act 109 had not been clearly foreshadowed by prior decisions<sup>18</sup> and rejected a rule of law that

<sup>18</sup> See 411 U.S. at 206-07 n.7.

would have state officials stay their hands until newly enacted state programs are "ratified" by the federal courts, or risk draconian, retrospective decrees should the legislation fall. 411 U.S. at 207.

This Court thus held that the equities of reliance by the nonpublic schools on the expectation of reimbursement outweighed the "remote possibility of constitutional harm" and affirmed the judgment of the District Court.

The principle of *Lemon II* has been applied in several recent federal cases involving nonpublic schools. For example, in *Americans United for Separation of Church & State v. Paire*, 348 F.Supp. 506 (D.N.H. 1972), a single District Judge held the leasing of parochial school space by a public school district to be unconstitutional in an opinion dated September 13, 1972. The judgment was subsequently vacated on appeal on the ground that it could only be entered by a three-judge District Court. 475 F.2d 462 (1st Cir. 1973). On remand, a three-judge District Court again held the leasing unconstitutional in an opinion dated May 1, 1973, but the Court's order on the same date, citing *Lemon II*, stated that its decision was not "intended to prevent completion of commitments and payment of pre-existing grants for the school year 1972-73 or previous years. *Americans United for Separation of Church & State v. Paire*, 359 F.Supp. 505, 512 (D.N.H. 1973). Thus, the judgment, although entered well before the end of the school year 1972-73, did not prevent fulfillment of the lease subsequent to the date of judgment. The same prospective application of a three-judge District Court's judgment was ordered in *Americans United for Separation of Church & State v. Benton*, 413 F. Supp. 955, 961 (S.D.Iowa 1976).

*Cf. Americans United for Separation of Church & State v. Board of Education*, 369 F.Supp. 1059, 1066 (E.D.Ky. 1974). Indeed, we have not found a case applying *Lemon II* otherwise, and rightly so.

In *Roemer v. Board of Public Works of Maryland*, 387 F.Supp. 1282 (D.Md. 1974), the three-judge District Court, while upholding the constitutionality of the Maryland statute as then in effect, pointed out that its

1971 version was unconstitutional. As substantial funds were paid out in 1971 to the five schools, this Court must decide whether to order the recipient schools to refund the illegally paid funds to the State of Maryland. 387 F.Supp. at 1291.

The court, relying on *Lemon II*, held that the Establishment Clause values to be protected did not require a refund. See 387 F.Supp. at 1291-92. And this Court specifically affirmed the judgment on this point, holding that "the District Court's ruling with respect to the 1971 payments was clearly in keeping with *Lemon II*." *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 767 n.23 (1976).

Clearly, *Lemon II* controls the question presented by this appeal, and there is no proper basis for any significant distinction between that case and the case at bar. First, the New York courts have found as a fact that appellee relied in its budgeting and other plans for the 1971-1972 school year upon the expectation of reimbursement under the Mandated Services Act for services rendered during the second half of the 1971-1972 school year.<sup>17</sup> In addition, the plaintiffs in *Levitt*, like

<sup>17</sup> See *supra*, p. 7; Appendix, p. 46. See also Appendix, pp. 4-6. Indeed, this Court indicated in *Lemon II* that reliance by nonpublic schools in circumstances such as this can be assumed. See 411 U.S. at 205 and n.6.

those in *Lemon*, did not move to enjoin preliminarily reimbursement at the commencement of their action, thus postponing any ruling at the District Court level on the merits of the constitutionality of the Mandated Services Act for almost 22 months. That this decision not to move for preliminary relief was motivated by "tactical considerations" as in *Lemon* is not unlikely.

Second, the decision of this Court in *Levitt*, as in *Lemon I*, was not "clearly foreshadowed" by prior decisions. The entire area of permissible or impermissible aid to nonpublic schools, or to the pupils in these schools or their parents, has been the subject of continuous development by this Court. Any claim that the outcome of the Mandated Services Act litigation in the *Levitt* case was clearly foreshadowed either in the District Court or in this Court is, we suggest, incorrect. This is clearly shown by several events relating to that case. A three-judge District Court was convened to decide the constitutionality of the Mandated Services Act, then an appropriate procedure only if a substantial constitutional question—not decided by prior litigation—existed. The District Court's decision was not unanimous; one judge filed a vigorous dissent. 342 F.Supp. at 445-46. On appeal, this Court did not summarily affirm the District Court's judgment, but rather required full briefing and oral argument. Finally, not only was there a dissent, but even the opinion of the Court indicated that a statute providing for reimbursement of required services other than teacher-prepared examinations may be constitutional.<sup>18</sup>

<sup>18</sup> See 413 U.S. at 482. Furthermore, Mr. Justice Douglas, Mr. Justice Brennan and Mr. Justice Marshall were of the view that affirmance was compelled by the decisions of the Court in *Committee for Public Education & Religious Liberty v. Nyquist*, *supra* note 15, and *Sloan v. Lemon*, 413 U.S. 825 (1973), which were handed down on the very same day as the decision in *Levitt*. See *id.*

Therefore, for purposes of the balancing test set forth in *Lemon II*, there can be no doubt, as held by the Court of Appeals in adopting the opinion of Presiding Justice Herlihy, that appellee did rely on being reimbursed for the costs of rendering the services mandated by the State and that appellee's reliance on the presumptive validity of the Mandated Services Act was justifiable.

In attempting to distinguish this case from *Lemon II*, appellant contends, relying on the majority opinion of the Appellate Division, that the critical difference is that, whereas in *Lemon II* the auditing function found by this Court in *Lemon I* to have been the unconstitutional flaw had been completed prior to the claim for payment, the auditing function has not been completed in the case at bar so that there can be no assurance that any money paid to appellee would be applied only to secular purposes; that, if payment is to be made under Chapter 996 according to the same formula set forth in the Mandated Services Act, this would in effect resurrect that Act; and that, if payment under Chapter 996 is to be made only for actual costs in performing the mandated services, an "entangling" audit process would result, creating constitutional interests which, in the opinion of the majority of the Appellate Division, outweighed the reliance interests of the schools.

This attempted distinction is misplaced and premised on a crabbed interpretation of *Lemon II*, rather than on the flexible equitable principles which formed the basis for that decision. Whether or not the audit function has been completed is insignificant because, as discussed at Point II, there is simply no rational basis for concluding that a judicial audit (presumably in 1978) of services performed in 1972 could constitute a present "entanglement", exces-

sive or otherwise, between the State and the religiously-affiliated schools.

Secondly, Chapter 996 does not "resurrect" the Mandated Services Act. Rather, Chapter 996 is limited to reimbursement of nonpublic schools for the single period of the spring 1972 semester when they relied on being reimbursed (and would have been reimbursed) but for the timing of the District Court's decision. Just as this Court found that reimbursement in *Lemon II* of nonpublic schools would "not substantially undermine the constitutional interests at stake in *Lemon I*",<sup>19</sup> reimbursement in this case would not undermine in any way the constitutional interest at stake in *Levitt*. Under the opinion adopted by the Court of Appeals,

the postaudit, which in this case is to be performed by the Court of Claims, will necessarily establish whether or not the amounts claimed for mandated services constitute a furtherance of the religious purposes of the claimant. 47 App.Div.2d at 397; 366 N.Y.S.2d at 906; JS Appendix B, p. A11.

Appellant's argument would require that *Lemon II* be inflexibly narrowed to its specific facts. It ignores not only the justifiable reliance by appellee on the validity of the Mandated Services Act and the delay of the plaintiffs in pressing for decision in the District Court with regard to it, but also the flexible, equitable approach which was the heart of this Court's opinion in *Lemon II*<sup>20</sup> and which is best summarized in this Court's own words:

In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities

<sup>19</sup> 411 U.S. at 201.

<sup>20</sup> See generally 411 U.S. at 198-201.

inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots. 411 U.S. at 201.

We respectfully submit that, applying this basic principle of *Lemon II* to this case, affirmance is required.

## POINT II

### THE CARRYING OUT OF THE COURT OF APPEALS' JUDGMENT WILL NOT RESULT IN ANY ENTANGLEMENT BETWEEN CHURCH AND STATE

Appellant argues at pages 14-17 of its brief that an "audit" of appellee's claim by the Court of Claims would entail "excessive entanglement between church and state." This rigid position ignores the fact that *Lemon II* represented an effort by this Court, in limited circumstances where reliance and ensuing hardship can be shown in connection with statutes which are not patently unconstitutional, to take a flexible approach whereby hardships can be ameliorated without significant constitutional injury. In addition, this novel argument ignores the fact that neither this Court nor any other court has ever held or even intimated that judicial review of a matter has entangled it with the litigants. The entanglement found to be unconstitutional in *Lemon I* was "[a] comprehensive, discriminating, and continuing state [administrative-agency] surveillance",<sup>21</sup> hardly the relationship contemplated between the Court of Claims and claimant under Chapter 996.

More fundamentally, the Court of Claims' audit, under the opinion adopted by the Court of Appeals, will not in-

<sup>21</sup> 403 U.S. at 619.

volve, as in *Lemon I*, "a comprehensive . . . surveillance" of the current (or even past) activities of appellee. Rather, it will involve a limited inquiry into certain activities of appellee in the spring of 1972 in carrying out the administrative and testing services which it was required to perform under state law. How this type of audit could affect in any way the present or future activities of appellee or inject the State into any such present or future activities defies explanation. Certainly, appellant's brief offers no such explanation.

With regard to "entanglement", this Court has repeatedly noted that, in our interdependent society, some degree of interaction or involvement between church and state is inevitable and necessary. For example, in *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664 (1970), this Court stated that

the questions are whether the involvement is *excessive*, and whether it is a *continuing* one calling for official and *continuing surveillance* leading to an impermissible degree of entanglement. 397 U.S. at 675 (emphasis added).

Certainly, neither question can be answered affirmatively in the case at bar. The involvement of the Court of Claims, limited to events occurring five years ago, would involve nothing more than the normal fact-finding process of any trial court. Obviously, this case does not (and could not possibly) present any problem of "continuing surveillance" by the State of the nonpublic schools. Hence, its "entanglement" argument is spurious.

Secondly, all services reimbursable in this case were performed and paid for by appellee out of its own funds almost five years ago during the winter and spring of 1972.

Finally, the "remote possibility of constitutional harm" discussed in *Lemon II* is even more remote here. To quote from the opinion adopted by the Court of Appeals:

. . . [T]he burden will be upon the claimant to prove that the items of its claim are in fact solely for mandated services and the burden will be upon the Court of Claims to make appropriate findings in regard thereto. 47 App.Div.2d at 400, 366 N.Y.S.2d at 908; JS Appendix B, p. A16.

In short, this one-time equitable reimbursement cannot, by any stretch of the imagination, constitute a threat to the principles of the Establishment Clause. What is involved is simply limited equitable relief to appellee in an unusual situation in which it finds itself by reason of its good faith reliance on the validity of the Mandated Services Act.

### Conclusion

In view of the foregoing, the appeal herein should be dismissed for lack of a substantial federal question or, in the alternative, the judgment appealed from should be affirmed.

Dated: May 20, 1977

Respectfully submitted,

RICHARD E. NOLAN  
*Attorney for Appellee*  
1 Chase Manhattan Plaza  
New York, New York 10005  
Tel.: (212) 422-3400

THOMAS J. AQUILINO, JR.  
LOWELL GORDON HARRISS

DAVIS POLK & WARDWELL  
*Of Counsel*

# APPENDIX

A-1

## Chapter 996 of the 1972 Laws of New York

### CLAIMS AGAINST STATE—NONPROFIT SCHOOLS

#### CHAPTER 996

An Act to confer jurisdiction upon the court of claims to hear, audit and determine the claim or claims of nonprofit schools, other than public schools for expenses incurred in rendering certain mandated services.

Approved and effective June 8, 1972.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Jurisdiction is hereby conferred upon the court of claims to hear, audit and determine the claim or claims of nonprofit schools in the state, other than public schools, against the state for reimbursement of the funds expended by them in rendering services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports required by law or regulation. The base of said claim or claims is that the State of New York represented to said schools that they would be reimbursed for such expenses incurred after July first, nineteen hundred seventy; that the said State knew that said schools were relying on said representation; that said representation

was an effective cause of said expenses by said schools; and that without any fault on the part of said schools complete reimbursement has not been paid to them, though due and owing. As such, said claim or claims are founded in right and justice, or in law or equity.

§ 2. In hearing, auditing and determining such claim or claims, the court of claims is hereby authorized to consider, *inter alia*:

(a) That prior to July first, nineteen hundred seventy, said nonprofit schools, rendered services for examination and inspection in connection with administering, grading and the compiling and reporting of the results of tests and examination, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualification and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation;

(b) That by a chapter of the laws of nineteen hundred seventy, it was determined and declared as a matter of legislative finding:

"That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as

required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.

And that nonpublic schools of the state are responsible for the education of more than eight hundred fifty thousand pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools which these children attend in fulfillment of the above state purposes are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonable assisting such services."

(c) That in furtherance of said policy, appropriations were made to the education department to enable the department to reimburse such schools for the rendering of such services;

(d) Based on the representation of the State that reimbursement would be made for such services, such schools already in fiscal crisis, by budgetary allocations and other methods made available the necessary personnel to perform such services;

(e) That the federal courts, by various orders enjoined payments to such schools. As a result reimbursement for the full period July first, nineteen hundred seventy-one to June thirtieth, nineteen hundred seventy-two, has not been made to such schools, although all such services were or will be duly performed;

## A-4

(f) That such schools during such period did incur expenses in providing the mandated services in reliance upon said representation of reimbursement;

(g) That but for this claim or claims complete reimbursement to such schools would not be made and such schools are thus without legal right to recover for said expenses;

(h) That the legislature recognizes a moral obligation to provide a remedy whereby such schools may recover the complete amount of expenses incurred by them prior to June thirtieth, nineteen hundred seventy-two in reliance on the said representation.

§ 3. If the court finds that such claim or claims or any of them were founded in right and justice or in law and equity against the state of New York, and are in right and justice presently payable thereby, the state shall be deemed to have been liable therefor and such claim or claims shall constitute legal and valid claims against the state, and the court may award and render judgments for the claimants as shall be just and equitable, notwithstanding the lapse of time since any such claim or claims or any parts thereof accrued, or the failure to do any act in relation to the presentation of such claims or any of them within the time prescribed by law, but no award shall be made or judgment rendered hereunder against the state unless such claim shall be filed with the court of claims within ninety days from the passage of this act, nor if such claim, as between citizens of the state, would be barred by lapse of time.

§ 4. This act shall take effect immediately.